



## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### 29 CFR Part 2550

[Application No. D-12060]

ZRIN 1210-ZA33

#### Proposed Amendment to Prohibited Transaction Exemption 84-24

**AGENCY:** Employee Benefits Security Administration, U.S. Department of Labor.

**ACTION:** Notice of Proposed Amendment to Prohibited Transaction Exemption 84-24.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to Prohibited Transaction Exemption (PTE) 84-24, an exemption from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The amendment would affect participants and beneficiaries of plans, Individual Retirement Account (IRA) owners, and certain fiduciaries of plans and IRAs.

**DATES:** *Public Comments.* Comments are due on or before [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

*Public Hearing.* The Department anticipates holding a public hearing approximately 45 days following the date of publication in the *Federal Register*. Specific information regarding the date, location, and submission of requests to testify will be published in a notice in the *Federal Register*.

*Applicability Date.* The Department proposes to make the final amendment effective 60 days after it is published in the *Federal Register*.

**ADDRESSES:** All written comments concerning the proposed amendments should be

sent to the Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor through the Federal eRulemaking Portal and identified by Application No. D-12060.

*Federal eRulemaking Portal:* Visit <http://www.regulations.gov>. Follow the instructions for sending comments.

*Docket:* For access to the docket to read background documents and comments, including the plain-language summary of the proposal required by the Providing Accountability Through Transparency Act of 2023, or comments, please go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

See SUPPLEMENTARY INFORMATION below for additional information regarding comments.

**FOR FURTHER INFORMATION CONTACT:** Susan Wilker, (202) 693-8540 (not a toll-free number), Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

## **SUPPLEMENTARY INFORMATION:**

### **Comment Instructions**

*Warning:* All comments received will be included in the public record without change and will be made available online at [regulations.gov](http://www.regulations.gov). This includes any personal information provided, unless the comment includes information claimed to be confidential or information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number), or confidential business information that you do not want publicly disclosed. If EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. The [www.regulations.gov](http://www.regulations.gov) website is an

“anonymous access” system, which means EBSA will not know your identity or contact information unless you provide it. If you send an email directly to EBSA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the Internet.

## **Background**

As described elsewhere in this edition of the *Federal Register*, the Department is proposing to amend the regulation defining when a person renders “investment advice for a fee or other compensation, direct or indirect” with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a “fiduciary” in section 3(21)(A)(ii) of ERISA and in section 4975(e)(3)(B) of the Code. The Department also is proposing amendments to existing PTEs 75-1, 77-4, 80-83, 83-1, 86-128, and 2020-02 elsewhere in this edition of the *Federal Register*.

The Department is proposing to amend PTE 84-24 to address specific issues that Insurers confront in complying with the current conditions of PTE 2020-02 when distributing annuities through independent agents. The ERISA and Code provisions at issue generally prohibit employee benefit plan and IRA fiduciaries from engaging in self-dealing in connection with transactions involving these plans and IRAs. Currently, PTE 84-24 allows these fiduciaries to receive compensation when plans and IRAs enter into certain insurance and mutual fund transactions that the fiduciaries recommend, as well as certain related transactions. The proposed amendment would provide exemptive relief to fiduciaries who are Independent Producers that recommend annuities from an unaffiliated Insurer to Retirement Investors on a commission or fee basis if certain protective conditions are met.

The Department is proposing this amendment on its own motion pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance

with procedures set forth in 29 CFR part 2570, Subpart B (76 FR 66637 (October 27, 2011)).<sup>1</sup>

### **Current PTE 84-24**

Currently, under PTE 84-24, plans and IRAs may purchase insurance or annuity contracts or investment company securities, and insurance agents or brokers, pension consultants, and principal underwriters may receive compensation as a result of these purchases.<sup>2</sup> Originally proposed in 1976,<sup>3</sup> PTE 84-24 covers several transactions in connection with the purchase of insurance and annuity contracts and the purchase and sale of securities issued by an investment company.

### **PTE 2020-02**

When the Department finalized PTE 2020-02 in December 2020, the Department explained that insurance companies could rely on either PTE 2020-02 or PTE 84-24 regardless of whether they sell their products through captive or independent agents. In the preamble to the final PTE 2020-02, the Department stated that insurance companies working with independent agents can satisfy the conditions of PTE 2020-02 related to the required policies and procedures either by supervising independent insurance agents or by contracting with insurance intermediaries to do so.<sup>4</sup> In April 2021, the Department

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<sup>1</sup> Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

<sup>2</sup> As defined in Section X(d), the term “Individual Retirement Account” or “IRA” means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F), including an Archer medical savings account, a health savings account, and a Coverdell education savings account. While the Department uses the term “Retirement Investor” throughout this document, the exemption is not limited only to investment advice fiduciaries of employee pension benefit plans and IRAs. Relief would be available for investment advice fiduciaries of employee welfare benefit plans with an investment component as well.

<sup>3</sup> 41 FR 56760 (Dec. 29, 1976), finalized as PTE 77-9, 42 FR 32395 (June 24, 1977)

<sup>4</sup> “Insurance company Financial Institutions can comply with the new exemption by supervising independent insurance agents, or by creating oversight and compliance systems through contracts with insurance intermediaries. The Financial Institution and/or intermediary would address incentives created with respect to independent agents’ recommendations of the Financial Institution’s insurance or annuity products.” 85 FR 82798, 82835 (Dec. 18, 2020).

provided further guidance in a set of Frequently Asked Questions (FAQs) regarding compliance with the exemption.<sup>5</sup> Specifically, Question 18 of the FAQs provided that:

When an independent insurance agent recommends an annuity under the exemption, the agent and the financial institution (e.g., the insurance company) must satisfy the exemption's conditions, including the fiduciary acknowledgement and the Impartial Conduct Standards with respect to that transaction. In such cases, the insurance company must ensure that it has adopted policies and procedures to ensure compliance with the Impartial Conduct Standards and to avoid incentives that place the firm's or agent's interests ahead of the interests of retirement investors. While the independent agent may recommend products issued by a variety of insurance companies, PTE 2020-02 does not require insurance companies to exercise supervisory responsibility with respect to the practices of unrelated and unaffiliated insurance companies. When an insurance company is the supervisory financial institution for purposes of the exemption, its obligation is simply to ensure that the insurer, its affiliates, and related parties meet the exemption's terms with respect to the insurance company's annuity which is the subject of the transaction.

Since issuing PTE 2020-02 and posting the FAQs on its website, the Department has conferred with representatives of insurance companies that distribute annuities through independent agents, regarding their compliance with the conditions of PTE 2020-02. At the meetings, the representatives almost universally asserted that the main compliance challenge they face in complying with PTE 2020-02 is that they cannot effectively exercise fiduciary authority over independent insurance agents who do not work for any one insurance company and are not obligated to recommend only one company's annuities. According to the insurance company representatives, unlike a broker-dealer that can readily control the products its representatives recommend and the compensation they receive, insurance companies working with independent agents have much less authority over the conduct and compensation of independent agents. These insurance companies also face much greater liability risk if they are required to provide a fiduciary acknowledgement, because they do not have the necessary control over the

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<sup>5</sup> <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf>

independent agents to manage the independent agent's product offerings and do not know the full range of products the independent agent is authorized to sell. Thus, despite the Department's compliance guidance provided in the preamble to PTE 2020-02 and FAQ 18, these parties represented to the Department that they prefer relying on existing PTE 84-24.

While acknowledging these concerns, the Department continues to believe that insurance companies can effectively exercise fiduciary oversight with respect to independent agents' recommendations of their own products under PTE 2020-02. PTE 2020-02 is a broad, flexible, and principles-based approach that applies across different financial sectors and business models and provides relief for multiple categories of Financial Institutions and Investment Professionals, including insurance companies selling their products through independent agents, and it would continue to be so if the Department adopts the amendments to PTE 2020-02 that it is proposing today. The Department is proposing to amend PTE 84-24, however, to provide a narrowly tailored, alternative exemption allowing independent insurance agents to receive commissions from insurance companies with respect to annuity recommendations.

As amended, PTE 84-24 would not require the insurance company to provide a fiduciary acknowledgement, and the insurance company would not be treated as a fiduciary merely because it exercised oversight responsibilities over independent insurance agents under the exemption.<sup>6</sup> Instead, the proposed amendment would require the independent agent that recommends the annuity to make the fiduciary acknowledgement,<sup>7</sup> and the insurance company selling its product through the independent agent only would be required to exercise supervisory authority over the

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<sup>6</sup> For purposes of this disclosure, and throughout the exemption, the term fiduciary status is limited to fiduciary status under Title I, the Code, or both. While this exemption and the SEC's Regulation Best Interest both use the term "best interest," the Department retains interpretive authority with respect to satisfaction of this exemption.

<sup>7</sup> For purposes of this disclosure, and throughout the exemption, the term fiduciary status is limited to fiduciary status under Title I, the Code, or both.

independent agent's recommendation of its own products. The proposed amended exemption would be limited to commissions or fees as defined in the amendment, which would have to be fully disclosed to the Retirement Investor.

### **Overview of the Proposed Amendment to PTE 84-24**

The Department is proposing to amend PTE 84-24 so that investment advice fiduciaries would rely on a new section of PTE 84-24 for independent insurance agents (called Independent Producers) selling non-securities annuities or other insurance products not regulated by the Securities and Exchange Commission (SEC) to Retirement Investors. The proposed amendment would exclude investment advice fiduciaries from the current relief in PTE 84-24 while proposing relief under a new section of the exemption with specific conditions for independent insurance agents providing investment advice. The Department's objective in proposing this amendment is to provide a level playing field for all investment advice fiduciaries.

To rely on the investment advice relief in this proposed amendment to PTE 84-24, the Independent Producers would have to sell annuities of two or more unrelated Insurers. Independent Producers that sell or recommend investment products other than annuities, such as mutual funds, stocks and bonds, and certificates of deposit must rely on PTE 2020-02 when receiving fees or other compensation in connection with investment recommendations related to those products. The amended PTE 84-24 would provide relief from the prohibited transaction rules only for the receipt of fully disclosed commissions or fees in connection with annuity recommendations or other insurance products not regulated by the SEC. In other respects, the proposed amendment to PTE 84-24 for investment advice would provide very similar protections to Retirement Investors as PTE 2020-02 and create a level playing field for all investment advice provided to Retirement Investors regardless of the investment products that are recommended.

The Department is proposing to amend PTE 84-24 to exclude investment advice fiduciaries from the existing relief provided in Section II, which would be redesignated as Section II(a). The proposed amendment would add Section II(b), which would provide investment advice fiduciaries with relief from the restrictions of ERISA sections 406(a)(1)(D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) if:

- the fiduciary is an Independent Producer (as defined in Section X(d)),
- the transactions are described in new Section III(g), and
- the conditions set forth in new Sections VI, VII, and IX are satisfied.

These conditions are similar to the conditions contained in PTE 2020-02 but are tailored to protect Retirement Investors from the specific conflicts that can arise for Independent Producers that are compensated through commissions when providing investment advice to Retirement Investors regarding the purchase of an annuity. The Department also is proposing to add a new eligibility provision in Section VIII for investment advice transactions and amend the current recordkeeping condition in Section V(e) with a new recordkeeping provision in Section IX that is similar to the recordkeeping provision in PTE 2020-02.

Although the Department is proposing a pathway for insurance companies to oversee the conduct of Independent Producers under the proposed amendment to PTE 84-24 without assuming fiduciary status, the Department remains concerned that, without fiduciary status, insurance companies may not take their supervisory obligations as seriously as they should. Accordingly, the proposed amendment does not provide relief for the Insurer, and it strictly limits the scope of relief to the Independent Producer's receipt of fully disclosed commissions. An Insurer must rely on PTE 2020-02 for relief if it is itself an investment advice fiduciary because it provides investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and the



regulations issued thereunder. In addition, an Insurer's systematic failures to comply with the proposed exemption's conditions could result in Independent Producers' inability to rely on the amended exemption for relief with respect to recommendations of that Insurer's products. In such a situation, the Independent Producer would still be able to receive compensation in connection with fiduciary investment advice related to the products of other Insurers, as long as those other Insurers complied with all conditions of amended PTE 84-24.

### **Effective Date**

The Department proposes that the amendment will be effective on the date that is 60 days after the publication of a final amendment in the *Federal Register*. Prior to the effective date, PTE 84-24 would remain available for all insurance agents and insurance companies that currently rely on the exemption. Thus, the Department confirms that the restrictions of ERISA section 406(a)(1)(A), 406(a)(1)(D), and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F), would not apply to the receipt of compensation by an Insurer, Investment Professional, or any Affiliate and Related Entity in connection with investment advice, if the recommendation were made before the effective date or pursuant to a systematic purchase program established before the effective date. Also, no party would be held to the amended conditions for a transaction that occurred before the effective date of the amended exemption.

### **Description of Changes to Existing PTE 84-24**

Section II of existing PTE 84-24 provides exemptive relief for the covered transactions described in Section III(a) through (f). The Department is proposing minor language changes to capitalize defined terms where they are used in the existing sections of PTE 84-24, to update the references to a "master or prototype plan" to instead refer to a "Pre-approved Plan," consistent with changes in IRS Rev. Proc. 2017-41, and to move

the definitions from existing Section VI to new proposed Section X. As amended, Section III(a)-(f) would read:

(a) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a Mutual Fund Commission or an Insurance Sales Commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract;

(b) The receipt of a Mutual Fund Commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company;

(c) The effecting by an insurance agent or broker, pension consultant or investment company Principal Underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company;

(d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company;

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-approved Plan; and

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when such investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-approved Plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2).

The Department also is proposing the following amendments.

## Excluding Investment Advice

The Department is proposing to exclude investment advice fiduciaries from relief for the transactions described in Section III(a) through (f) of current PTE 84-24.

Investment advice fiduciaries would be required to comply with the conditions in Sections VI-VIII, which are tailored specifically for investment advice. The Department notes that many types of fiduciaries are already excluded from the transactions in Sections III(a)-(d). The relief provided for in these sections would remain available for non-fiduciaries and nondiscretionary trustees,<sup>8</sup> even if they do not need all of the prohibited transaction relief provided. The relief for the transaction described in Section III(e) would be available for any insurance company that is a fiduciary (other than an investment advice fiduciary) or service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-approved Plan. The relief for the transaction described in Section III(f) would be available for any insurance company, principal

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<sup>8</sup> Nondiscretionary trustees were added in 1984, in response to a request from the Investment Company Institute listing typical nondiscretionary or trustee services. In an April 21, 1980 letter, “ICI states nondiscretionary trustees and custodians:

- (a) Open and maintain plan accounts and, in the case of defined contribution plans, individual participant accounts, pursuant to the employer’s instructions;
- (b) Receive contributions from the employer and credit them to individual participant accounts in accordance with the employer’s instructions;
- (c) Invest contributions and other plan assets in shares of a mutual fund or funds or other products such as insurance or annuity contracts designated by the employer, plan trustee, or participants, and reinvest dividends and other distributions in such investments;
- (d) Redeem, transfer, or exchange mutual fund shares or surrender insurance or annuity contracts as instructed by the employer, plan trustee, or participant;
- (e) Provide or maintain “designation of beneficiary” forms and make distributions from the trust or custodial account to participants or beneficiaries in accordance with the instructions of the employer, plan trustee, participants, or beneficiaries;
- (f) Deliver to participants or their employer all notices, prospectuses, and proxy statements, and vote proxies in accordance with the participants’ instructions.
- (g) Maintain records of all contributions, investments, distributions, and other transactions and report them to the employer and participants;
- (h) Make necessary filings with the Internal Revenue Service and other government agencies;
- (i) Keep custody of the plan’s assets;
- (j) Reply to and prepare correspondence, either directly or through the mutual fund distributor or adviser, regarding the investment account and the operation and interpretation of a master or prototype plan sponsored by the complex to which the nondiscretionary trustee or custodian belongs.

In some situations, the trustee or custodian is empowered to amend the master or prototype plan; in others, this power resides in the sponsor of the master or prototype plan. ICI further describes the duties of the nondiscretionary trustees as “ministerial” and indicates that such trustees possess no decisional authority with respect to a plan’s funding medium or subsequent purchases or sales.”

underwriter, or investment company adviser that is a fiduciary (other than an investment advice fiduciary) or service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-approved Plan; or (2) the provision of nondiscretionary trust services to the plan; or (3) both (1) and (2).<sup>9</sup>

The Department requests comment on whether the relief in proposed Section II(a) for the covered transactions in Section III(a)-(f) will be used by fiduciaries and non-fiduciaries. The Department further asks whether parties are currently relying on Sections III(e) and (f), involving Pre-approved Plans. To the extent Sections III(a) through (f) provide needed relief, the Department also asks whether the conditions in current Sections IV and V are sufficiently protective for the specific covered transactions.

### **Commissions**

The Department is proposing to replace the term “sales commission,” which is not defined in Section VI of existing PTE 84-24, with the more specific terms Mutual Fund Commission and Insurance Sales Commission. “Insurance Sales Commission” would be defined as a sales commission paid by the Insurance Company or an Affiliate to the Independent Producer<sup>10</sup> for the service of recommending and/or effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailing fees but excluding revenue sharing payments, administrative fees or marketing payments, payments from parties other than the Insurance Company or its Affiliates, or any other similar fees. “Mutual Fund Commission” would be defined as a commission or sales load paid by either the Plan or the investment company for the service of effecting or executing the purchase of investment company securities, but does not include 12b–1 fees, revenue sharing payments, administrative fees, management fees, or marketing fees.

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<sup>9</sup> The Department is not proposing to amend Section III(f) to remove the phrase “investment company adviser,” but notes that those providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) would be excluded under Section II(a).

<sup>10</sup> The Insurance Sales Commission may be paid directly to an intermediary such as an intermediary marketing organization (IMO) or field market organization (FMO), which then compensates the individual Independent Producer who has provided investment advice.

The Department is proposing to use these terms to clarify the types of compensation that can be received under the exemption. The Department is limiting the exemption to sales commissions on insurance or annuity contracts and investment company securities, as opposed to any related or alternative forms of compensation. This is consistent with the Department's historical understanding and intent. The exemption was originally granted in 1977, and the conditions were crafted with simple commission payments in mind. In the interim, the exemption was not amended or formally interpreted to broadly permit additional types of compensation. The proposed definitions would provide certainty regarding the payments permitted by the exemption.<sup>11</sup> The Department requests comment on whether these defined terms appropriately capture the type of compensation that an Independent Producer may receive.

#### **Disclosures to IRA owners**

Section V(b)(1) of PTE 84-24 currently requires insurance agents, brokers, or consultants to provide disclosures to an "independent fiduciary" before executing a transaction involving the purchase of an annuity with plan assets. That fiduciary must acknowledge receipt of the disclosure in writing and approve the transaction. The Department is proposing to clarify that for transactions involving IRAs, these disclosures may be provided to the IRA owner instead of an unrelated fiduciary. The Department requests comment on how frequently this provision is currently used, how frequently it would be used with the additional proposed changes to PTE 84-24 described below, how it is practically implemented today, and how the revised provision would be operationalized.

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<sup>11</sup> The Department has previously expressed this view on the scope of relief under PTE 84-24 in amending the exemption in 2016. "The Department does not believe this exemption was properly interpreted over the years to provide relief for payments such as administrative services fees, which are not akin to a commission. No determination has been made that the conditions of the exemption are protective in the context of such payments. Without further information on these fees, or suggested additional conditions addressed at these types of payments, the Department declines to take such an expansive approach to relief from the prohibited transaction rules under the terms of this exemption." 81 FR 21147, 21166 (Apr. 8, 2016).

## **Discretionary Managers**

The Department proposes to clarify the exclusion for discretionary managers in current Section V(a)(3), which provides that the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter may not be a fiduciary who is expressly authorized in writing to manage, acquire or dispose of the plan's assets on a discretionary basis. The Department is proposing to amend this provision to exclude fiduciaries with discretionary authority, regardless of whether that authority has been conferred orally or in writing. As amended, proposed Section V(a)(3) would provide that the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter may not be a fiduciary who is authorized (formally or informally) to manage, acquire or dispose of the plan's assets on a discretionary basis. The Department intends for this change to be a mere clarification, but requests comment as to whether fiduciaries with oral authority to manage plan assets have been relying on PTE 84-24, because the current condition requires the fiduciary to be "expressly authorized in writing."

## **Recordkeeping**

The Department is proposing to add a new Section IX to PTE 84-24 that would require fiduciaries engaging in all transactions covered by the exemption to maintain records necessary for the following to determine that the conditions of this exemption have been met:

- 1) any authorized employee of the Department or the Internal Revenue Service or another state or federal regulator,
- 2) any fiduciary of a Plan that engaged in a transaction pursuant to this exemption,

- 3) any contributing employer and any employee organization whose members are covered by a Plan that engaged in a transaction pursuant to this exemption, or
- 4) any participant or beneficiary of a Plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

This requirement would replace the more limited existing recordkeeping requirement in current Section V(e).

This proposed amendment to the recordkeeping requirement is consistent with the recordkeeping provision the Department has included in other existing class exemptions (including the proposed amendment to the recordkeeping provisions of PTE 2020-02). It is intended to protect the rights of plan participants, beneficiaries, and IRA owners by ensuring that they and the Department are provided with sufficient information to determine whether the exemption conditions have been satisfied.

### **Fiduciary Investment Advice Exemption**

The relief for fiduciary investment advice in proposed Section II(b) for the covered transactions described in proposed Section III(g) is generally similar to the relief provided in PTE 2020-02. However, while PTE 2020-02 is available for almost any fiduciary investment advice provider, the amended PTE 84-24 would be available only for investment advice that is provided to a Retirement Investor by an Independent Producer who works with multiple insurance companies to sell non-securities annuities or other insurance products not regulated by the SEC. The Department requests comment on whether to exclude these other insurance products not regulated by the SEC and limit Section III(g) to only non-securities annuities.

Independent Producers relying on proposed Section III(g) may reasonably rely on factual representations from the Insurer, and the Insurer may reasonably rely on factual

representations from the Independent Producer regarding compliance with the exemption conditions, as long as they do not know that such factual representations are incomplete or inaccurate. For example, the Independent Producer can rely on the Insurer's representations that it is maintaining the required documentation.

Proposed Section VI provides conditions for transactions described in proposed Section III(g) and would require the advice to be provided by an Independent Producer that is authorized to sell annuities from two or more unrelated Insurers. The term "Independent Producer" would be defined in Section X as a person or entity that is licensed under the laws of a state to sell, solicit or negotiate insurance contracts, including annuities, and that sells products of multiple unaffiliated insurance companies to Retirement Investors but is not an employee of an insurance company (including a statutory employee under Code section 3121). The term "Retirement Investor" would be defined in proposed Section X(o) to have the same meaning as it has in PTE 2020-02, and the term "Insurer" would be defined in proposed Section X(f) similarly to the definition of the term "Financial Institution" in PTE 2020-02, except it would be limited to insurance companies.

Thus, proposed Section VI would limit the transactions described in proposed Section III(g) to the narrow category of transactions in which an independent, insurance-only agent provides investment advice to a Retirement Investor regarding a non-securities annuity or insurance contract. For all other investment advice transactions, including those by Independent Producers that do not satisfy the conditions of the amended PTE 84-24 and those involving captive or career insurance agents, the advice provider would have to rely on PTE 2020-02 to receive exemptive relief for investment advice transactions. The Department has determined that when non-independent agents recommend insurance products, the insurance company whose product is recommended should be willing and able to acknowledge its fiduciary status under ERISA and the Code



when investment advice is provided to a Retirement Investor for a fee, because it has sufficient control over the agent and the products the agent recommends.

Even though amended PTE 84-24 would not require Insurers to be fiduciaries, they would be subject to certain conditions when their products are recommended. Consistent with the NAIC Suitability in Annuity Transactions Model Regulation (the NAIC Model Regulation),<sup>12</sup> and as discussed in the policies and procedures section below, the proposed exemption would require the Insurer whose product is being sold to provide meaningful supervision over the Independent Producer making the recommendation and sale to the Retirement Investor. As stated in proposed Section VI(b), the Insurer would not become an investment advice fiduciary under ERISA and/or the Code merely by complying with the applicable exemption conditions and providing the required supervision. However, the Department cautions that Insurers selling insurance and annuity products through Independent Producers could become an investment advice fiduciary under ERISA and/or the Code through other actions they take. If the Insurers are fiduciaries, they could not rely on amended PTE 84-24 and would need to rely on a different prohibited transaction exemption, such as PTE 2020-02, for relief from ERISA section 406(b) and Code section 4975.

To facilitate compliance with the exemption, Independent Producers and Insurers may rely on factual representations from each other, as long as they are reasonable in doing so. For example, an Independent Producer may generally rely on an Insurer's written report generated as part of its retrospective review required by Section VII(d), unless the Independent Producer knows (or should know) that the report is inaccurate or incomplete.

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<sup>12</sup> Available at <https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf>

## **Exclusions**

Section VI(c) proposes to exclude certain specific investment advice transactions. Under proposed Section VI(c)(1), the relief would not be available if the Plan is covered by Title I of ERISA and the Independent Producer, Insurer, or any Affiliate is the employer of employees covered by the Plan, or the Plan's named fiduciary or administrator. For example, an Independent Producer that sponsors a plan for its employees and provides the investment advice to the plan can only receive direct expenses and not reasonable compensation for the advice. However, there is an exception when the advice provider is selected by an independent fiduciary. Proposed Section VI(c)(2) would exclude transactions that involve the Independent Producer acting in a fiduciary capacity other than as an investment advice fiduciary. Unlike in PTE 2020-02, the Department is not proposing a specific provision for pooled employer plans, because the Department does not expect that pooled employer plans would need to rely on the limited relief in this exemption. The Department requests comment on whether pooled employer plans as described in ERISA section 3(43) would rely on the investment advice relief in amended PTE 84-24.

## **Impartial conduct standards of Amended PTE 84-24**

Section VII(a) of the proposed amendment would condition relief for investment advice transactions described in proposed Section III(g) on the Independent Producer that is providing investment advice to Retirement Investors complying with the Impartial Conduct Standards that are the same as those in PTE 2020-02—i.e., acting in the Retirement Investor's Best Interest, receiving no more than reasonable compensation, and making no misleading statements—with some modifications to reflect the specifics of the independent agent channel. These standards are discussed below.

### **Best Interest**

The Best Interest standard would require the Independent Producer to provide investment advice that is in the Retirement Investor's Best Interest at the time it is provided. Proposed Section VII would rely on the same Best Interest standard from PTE 2020-02. As defined in proposed Section X(b), Best Interest advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and does not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party. For example, in choosing between annuity products offered by Insurers whose products the Independent Producer is authorized to sell, the Independent Producer may not recommend a product that is worse for the Retirement Investor but better or more profitable for the Independent Producer or Insurer.

### **Reasonable Compensation**

Like PTE 2020-02, the proposed exemption requires an Independent Producer's compensation to not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2). To tailor this condition to the specifics of insurance sales, Section VII(a)(2) would require that the Independent Producer can only receive an Insurance Sales Commission as compensation in connection with the transaction.

## **No Misleading Statements**

Proposed Section VII(a)(3) provides the same prohibition on misleading statements that is part of PTE 2020-02. This provision requires an Independent Producer's statements to the Retirement Investor about the recommended transaction and other relevant matters to not be materially misleading at the time the statements are made. For purposes of this condition, the term "materially misleading" includes omitting information that is needed to make the statement not misleading in light of the circumstances under which it was made. To the extent the Independent Producer provides materials, including marketing materials that are prepared and provided by the Insurer, this condition also would require such materials not to be materially misleading to the Independent Producer's knowledge.

## **Disclosure**

Section VII(b) of the proposed amendment would require Independent Producers to provide disclosures to Retirement Investors before engaging in a transaction pursuant to this exemption. Similar to PTE 2020-02, proposed Section VII(b)(1) would require a fiduciary acknowledgement, but unlike PTE 2020-02, only the Independent Producer and not the Insurer must acknowledge that it is a fiduciary providing investment advice to the Retirement Investor. Also similar to the proposed amendment to PTE 2020-02, the Department is proposing additional disclosures in PTE 84-24 Section VII(b) to help ensure that Retirement Investors have sufficient information to make an informed decision about the costs of the transaction and the significance and severity of the Independent Producer's conflicts of interest. The Department requests comment on these disclosures, particularly regarding whether additional or alternative information would be helpful to Retirement Investors receiving advice from Independent Producers. The Department is also interested in receiving comments regarding whether it should require Insurers or Independent Producers to maintain a public website containing the pre-

transaction disclosure, a description of the Insurer's or Independent Producer's business model, associated Conflicts of Interest (including arrangements that provide third party payments), and a schedule of typical fees. The Department is interested in receiving data and other information regarding the benefits of such a web disclosure. The Department is also interested in receiving any data that commenters may have that can inform an estimate of the extent to which Retirement Investors, investment consultants, and third party intermediaries would visit and use a webpage that includes such disclosures. *Pre-Transaction Disclosure*

Similar to PTE 2020-02, proposed Section VII(b)(1) would require a fiduciary acknowledgement, but unlike PTE 2020-02, only the Independent Producer and not the Insurer must acknowledge that it is a fiduciary providing investment advice to the Retirement Investor.<sup>13</sup> Section VII(b)(2) would require the Independent Producer to provide the Retirement Investor with a written statement of the Best Interest standard of care that the Independent Producer owes to the Retirement Investor. Under Section VII(b)(3), the Independent Producer must provide a written description of the services to be provided and the Independent Producer's material Conflicts of Interest that is accurate and not misleading in any material respects. The description will include the products the Independent Producer is licensed and authorized to sell and inform the Retirement Investor in writing of any limits on the range of insurance products recommended. The Independent Producer must identify the specific Insurers and specific investment products available for recommendation.

Under proposed Section VII(b)(4), the Independent Producer would also be required to provide a written statement of the amount of the Insurance Sales Commission it will be paid in connection with the purchase by the Retirement Investor of the

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<sup>13</sup> The Department cautions that an Insurer cannot insulate itself from fiduciary status merely by not making this acknowledgment. As noted above, an Insurer may become a fiduciary based on its actions.

recommended annuity. The statement must disclose the amount of the expected Insurance Sales Commission, in both dollars and as a percentage of gross annual premium payments. If applicable, the statement must also disclose the amount the Independent Producer will be paid for the first year and each succeeding year.<sup>14</sup>

Under proposed Section VII(b)(5), the Independent Producer would also be required to provide a written statement informing the Retirement Investor of the right to obtain specific information regarding costs, fees, and compensation, and how to obtain it, free of charge. The statement must be written in plain English, taking into consideration the Retirement Investor's level of financial experience, and it must be accurate and not misleading. The cost, fee, and compensation information may be described in dollar amounts, percentages, formulas, or other means reasonably designed to be materially accurate in scope, magnitude, and nature of the compensation. The information must be detailed enough for the Retirement Investor to make an informed judgment about the transaction costs and the significance and severity of the Conflicts of Interest. For example, the Retirement Investor may ask how the Independent Producer would be compensated for recommending and selling other products they are authorized to sell and whether the Independent Producer is likely to receive more as a result of its recommendation than it would have received if it had recommended other annuities.

The proposed requirement to disclose the amount of expected Insurance Sales Commission, expressed both in dollars and as a percentage of gross annual premium payments, if applicable, for the first year and for each of the succeeding years is consistent with the existing disclosure requirements in PTE 84-24 Section V(b)(1). The

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<sup>14</sup> Some insurers offer fee-based annuities which are generally designed for sale in fee-based distribution models. These annuities do not pay a sales commission and typically have no withdrawal charges or lower charges than under commissioned products. Compensation for sales of fee-based annuities is usually based on a percentage of the annuity's account value or some other methodology. Fee-based annuities are eligible for the relief provided by the proposed amendment if all the conditions of the exemption are met. If an Independent Producer recommends a fee-based annuity, the written statement must disclose the specific method for determining the amount of compensation for the first year and succeeding years, expressed both in dollars and as percentage of the account value (or other relevant value) to the extent possible.

proposed requirement to disclose the range of compensation is intended to ensure that the Retirement Investor understands the magnitude of the Independent Producer's material Conflicts of Interest. Without a single Insurer overseeing each recommendation, Independent Producers must carefully analyze and disclose the various incentives available from different Insurers that could affect the recommendation. For this reason, proposed Section VII(b)(4) requires the Independent Producer to make specific disclosures before the sale of a recommended annuity. The Independent Producer must consider and document its conclusions that the recommended annuity is in the Retirement Investor's Best Interest and provide that documentation to the Retirement Investor and the Insurer.

To assist Independent Producers in complying with this proposed exemption's disclosure conditions, the Department is providing the following proposed model language that will satisfy proposed Section VII(b)(1), (2), and (5).

When we make investment recommendations to you regarding your retirement plan account or individual retirement account, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money creates some conflicts with your interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours. Under this special rule's provisions, we must:

- Meet a professional standard of care when making investment recommendations (give prudent advice);
- Never put our financial interests ahead of yours when making recommendations (give loyal advice);
- Avoid misleading statements about conflicts of interest, fees, and investments;
- Follow policies and procedures designed to ensure that we give advice that is in your best interest;
- Charge no more than is reasonable for our services; and
- Give you basic information about conflicts of interest.

You can ask us for more information explaining costs, fees, and compensation, so that you may make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest. We will provide you with this information at no cost to you.

Please note that the Department is not proposing to include model language for Section VII(b)(3) or (4) that would describe services to be provided, the conflicts of interest, or the commissions paid because those will vary for each Independent Producer.

### **Best Interest Documentation and Rollover Disclosure**

Under proposed Section II(b)(6), before the sale of a recommended non-security annuity, the Independent Producer would consider and document its conclusions as to whether the recommended non-security annuity is in the Best Interest of the Retirement Investor. The Independent Producer must provide this documentation to both the Retirement Investor and to the Insurer whose products are being sold. The Department requests comment on whether this proposed condition should be expanded to other insurance products not regulated by the SEC.

Proposed Section VII(b)(7) would further require Independent Producers to provide a rollover disclosure that is similar to the disclosure required in the proposed amendment to PTE 2020-02 Section II(b)(5). Before engaging in a rollover or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Independent Producer must consider and document its conclusions as to whether a rollover is in the Retirement Investor's Best Interest and provide that documentation to the Retirement Investor. Relevant factors to consider must include but are not limited to:

- the alternatives to a rollover, including leaving the money in the Plan, if applicable,
- the comparative fees and expenses,
- whether an employer or other party pays for some or all administrative expenses, and
- the different levels of fiduciary protection, services, and investments available.

To assist the Insurer in satisfying its supervisory obligations, the Independent Producer



must also provide the documentation to the Insurer.

### **Good Faith**

Proposed Section VII(b)(6) provides that Independent Producers and the Insurer may rely in good faith on information and assurances from other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate. Proposed Section II(b)(7) confirms that the Independent Producer would not be required to disclose information that otherwise is prohibited by law.

### **Policies and Procedures**

The exemption depends on oversight by a responsible Insurer to ensure that appropriate policies and procedures are in place. While the exemption would not require the Insurer to act in a fiduciary capacity or to acknowledge fiduciary status, the Insurer would be expected to adopt and implement protective policies and procedures, and to carefully police recommendations of its own investment products. These requirements are consistent with supervisory requirements for insurance companies under state insurance law, and do not require the Insurers to police Independent Producers' recommendations of competitors' products.

Proposed Section VII(c) would require Insurers to establish, maintain, and enforce written policies and procedures. These conditions are similar to those in PTE 2020-02 Section II(c), including that compliance with these obligations are the Insurer's responsibility and not the Independent Producer's. Under proposed Section VII(c)(1), the Insurer must establish, maintain, and enforce written policies and procedures for the Insurer to review each of the Independent Producer's recommendations before an annuity is issued to a Retirement Investor. The policies and procedures must be prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. This requirement is similar to that in PTE 2020-02 and is consistent

with the language in NAIC Model Regulation Section 6.C.(2)(d), which provides that “[t]he insurer shall establish and maintain procedures for the review of each recommendation prior to issuance of an annuity that are designed to ensure there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer’s financial situation, insurance needs and financial objectives.” Under the proposal, the Insurer’s prudent review of the Independent Producer’s specific recommendations must be made without regard to the Insurer’s own interests or those of its affiliates and related entities.

The Department notes that the NAIC Model Regulation contemplates that insurance companies will maintain a system of oversight with respect to insurance agents. Insurers could implement procedures to review annuity sales to Retirement Investors to ensure that they are made in compliance with the Impartial Conduct Standards similar to how they currently are required to review annuity sales to ensure compliance with the state-law suitability requirements.<sup>15</sup> Section I of the NAIC Model Regulation provides that the purpose of the regulation is to “require producers, as defined in this regulation, to act in the best interest of the consumer when making a recommendation of an annuity and to require insurers to establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the

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<sup>15</sup> NAIC Model Regulation Section 6.C.(2)(d) provides that “[t]he insurer shall establish and maintain procedures for the review of each recommendation prior to issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer’s financial situation, insurance needs and financial objectives. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria”). Section 6.C.(2)(e) provides that “[t]he insurer shall establish and maintain reasonable procedures to detect recommendations that are not in compliance with subsections A, B, D and E. This may include, but is not limited to, confirmation of the consumer’s consumer profile information, systematic customer surveys, producer and consumer interviews, confirmation letters, producer statements or attestations and programs of internal monitoring. Nothing in this subparagraph prevents an insurer from complying with this subparagraph by applying sampling procedures, or by confirming the consumer profile information or other required information under this section after issuance or delivery of the annuity.”

transaction are effectively addressed.”<sup>16</sup> Accordingly, the Department believes that a system of oversight by Insurers over Independent Producers is consistent with the obligations imposed by NAIC’s Model Regulation, and is achievable under this proposed amendment to PTE 84-24.

In terms of the specific oversight requirements, the Department confirms that under the proposed amendment, an Insurer would only be required to supervise an Independent Producer’s recommendations of the annuities it offers to Retirement Investors. The Insurer would not be required to review annuities offered by another institution. The Department also clarifies that the exemption would not require the Insurer to consider or compare the specific annuities that an Independent Producer sells or the compensation relating to those annuities, unless they are annuities the Insurer offers. This approach is also consistent with the approach of NAIC Model Regulation Section 6.C.(4).<sup>17</sup>

Under proposed Section VII(c)(2), the Insurer’s policies and procedures must mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and the Insurer’s incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any Affiliate, ahead of the Retirement Investor’s interests. The Insurer’s procedures must identify and eliminate quotas, appraisals, bonuses, contests, special awards, differential compensation, riders and or other similar features that are intended, or that a reasonable person would conclude are likely, to incentivize Independent Producers to provide recommendations that do not meet the Impartial Conduct Standards. This is the same condition that applies to Financial Institutions under Section II(c)(2) of

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<sup>16</sup> *Id.*, Section 1.A.

<sup>17</sup> NAIC Model Regulation Section 6.C.(4) provides that an insurer is not required to include in its system of supervision: (a) A producer’s recommendations to consumers of products other than the annuities offered by the insurer; or (b) Consideration of or comparison to options available to the producer or compensation relating to those options other than annuities or other products offered by the insurer.

PTE 2020-02. It is also consistent with, although more protective than, the narrower NAIC Model Regulation section 6.C.(2)(h), which prohibits an insurer from establishing sales contests, sales quotas, bonuses, and non-cash compensation that are based on sales of specific annuities within a limited period of time.

Under proposed Section VII(c)(2), an Insurer could not offer incentive vacations, trips, or even educational conferences, if qualification for the vacation, trip or conference is based on sales volume or satisfaction of sales quotas. The Best Interest standard discussed above and defined in proposed Section X(b) clearly prohibits these types of incentives on the grounds they create undue conflicts of interest. Moreover, the Department believes that educational opportunities should be offered equally to all agents and not connected to sales volume, because training is a necessary component of providing Best Interest advice. This emphasis on Independent Producer training is consistent with NAIC Model Regulation section 6.C.(2)(c), which requires insurers to provide its producers with product-specific training and training materials that explain all material features of its annuity products.

Under proposed Section VII(c)(3), the Insurer's policies and procedures must include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors. It must also include a prudent process for taking action to protect Retirement Investors from Independent Producers who have failed or are likely to fail to adhere to the Impartial Conduct Standards, or who lack the necessary education, training, or skill. This is consistent with, but more protective than, NAIC Model Regulation section 7.B.(11), which requires an insurer to verify the producer has completed the annuity training course required under NAIC Model Regulation section 7 before allowing the producer to sell an annuity product for that insurer.

As part of a prudent evaluation of an Independent Producer's background, the Insurer must carefully review customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The Insurer must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards, and it must review that determination at least annually as part of the retrospective review. The Department notes that Insurers may rely in part on an automated system to apply general standards and review formal discipline records, as long as careful, individual review is applied when the general review raises concerns. However, the Department expects that an Insurer would not work with an Independent Producer that either has been barred by any regulator from selling insurance or annuity contracts, or that is ineligible to rely on either PTE 2020-02 or the amended PTE 84-24 under proposed Section VIII. The Department requests comments on these requirements and is specifically interested in the systems Insurers currently use to determine whether Independent Producers are compliant with state insurance obligations. The Department is also interested in comments about how Insurers have operationalized the supervisory requirements in the NAIC Model Regulation.

Under proposed Section VII(c)(4), Insurers must provide their complete policies and procedures to the Department within 10 days upon request. The Department believes that ensuring its access to policies and procedures will facilitate the quicker resolution of disputes and allow the Department, if it desires, to survey the policies and procedures for exemption compliance and effectiveness.

### **Retrospective Review**

Proposed Section VII(d) would require Insurers to conduct a retrospective review, at least annually. The retrospective review must be reasonably designed to detect and

prevent violations of, and achieve compliance with the Impartial Conduct Standards, the terms of this exemption, and the policies and procedures governing compliance with the exemption, including the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any.

The retrospective review requirement is similar to that in Section II(d) of PTE 2020-02. However, unlike PTE 2020-02, Insurers under proposed Section VII(d) of PTE 84-24 must include in their review a prudent determination whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. This review does not need to be as extensive as the initial decision to contract with an Independent Producer. An Insurer may consider any change in discipline records that are found in widely-available databases and rollover documentations that have been provided under Section VII(c)(5). Additionally, the Insurer must update the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with Section VII(c).

Consistent with both PTE 2020-02 and the NAIC Model Regulation Section 6.C.(2)(i),<sup>18</sup> proposed Section VII(d)(2) would require the Insurer to provide a Senior Executive Officer with an annual written report which details the review. Under Section VII(d)(3), the Department would further require the Insurer to provide the Independent Producer with the underlying methodology and results of the retrospective review. The Department understands that Insurers will conduct reviews for many different Independent Producers and confirms that Independent Producers only have the right to

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<sup>18</sup> NAIC Model Reg Section 6.(C)(i) provides that: "The insurer shall annually provide a written report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any."

information about their own sales. There is no obligation to inform any Independent Producers of an unrelated Independent Producer's failure.

Proposed Section VII(d)(4) would require a Senior Executive Officer of the Insurer to annually certify that:

- The officer has reviewed the retrospective review report,
- The Insurer has filed (or will file timely, including extensions) Form 5330, reporting any non-exempt prohibited transaction discovered by the Insurer in connection with investment advice covered under Code section 4975(e)(3)(B),
- The Insurer has advised the Independent Producer of the violation and any resulting excise taxes owed under Code section 4975, and
- The Insurer has notified the Department of Labor of the violation via email to [PTE\\_84-24@dol.gov](mailto:PTE_84-24@dol.gov).
- The Insurer has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and
- The Insurer has in place a prudent process to modify such policies and procedures as business, regulatory, and legislative changes and events dictate, as well as a prudent process to test the effectiveness of such policies and procedures on a periodic basis, to ensure its continuing compliance with the exemption's conditions.

Under proposed Section VII(d)(5), the review, report, and certification must be completed no later than 6 months following the end of the period covered by the review, and proposed Section VII(d)(6) would require the Insurer to retain the report,

certification, and supporting data for a period of six years and make the report, certification, and supporting data available to the Department, within 10 business days of request, to the extent permitted by law.

### **Self-correction**

While the Insurer is responsible for the retrospective review, proposed Section VII(e) would allow the Independent Producer to make the corrections needed to avoid a non-exempt prohibited transaction in certain circumstances. Self-correction would be allowed in cases when either (1) the Independent Producer has refunded any charge to the Retirement Investor or (2) the Insurer has rescinded a mis-sold annuity, canceled the contract, and waived the surrender charges. This is somewhat different from the self-correction provision in PTE 2020-02, which is focused on investment losses. With a fixed annuity, the consumer is guaranteed not to lose any account value but can incur a charge (and hence a loss) if the contract is surrendered during the surrender charge period. The usual remedy for a mis-sold annuity is rescission, which requires the insurer to cancel the contract and waive surrender charges. Under the proposed amendment, the Independent Producer must notify the Department of the violation and the refund or rescission via email to PTE\_84-24@dol.gov within 30 days of correction. The correction must occur no later than 90 days after the Independent Producer learned, or reasonably should have learned, of the violation. Lastly, the Independent Producer must notify the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction must specifically be set forth in the written retrospective review report.

### **Eligibility**

Section VIII of the proposed amendment identifies circumstances under which an Independent Producer or Insurer would become ineligible to rely on the exemption for 10 years, and also circumstances when an entity would not be permitted to serve as an



Insurer under this exemption for 10 years. These eligibility provisions are similar to the provisions of Section III of PTE 2020-02, and are intended to promote compliance.

Section VIII(a) describes how Independent Producers can become ineligible. The proposed amendment sets forth the specific crimes (including foreign crimes) that could cause ineligibility in Section III(a)(1). Independent Producers would also become ineligible if they are issued a written ineligibility notice from the Department stating that they: (A) engaged in a systematic pattern or practice of violating the conditions of this exemption; (B) intentionally violated, or knowingly participated in violations of, the conditions of this exemption; (C) engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay excise taxes involving investment advice; or (D) provided materially misleading information to the Department in connection with its conduct under the exemption. Independent Producers would become ineligible six months after the conviction date, the date of the Department's written determination regarding a foreign conviction, or the date of the Department's written ineligibility notice, as applicable. During the six-month period, the Independent Producers are still fiduciaries, subject to all of the fiduciary requirements and prohibited transaction rules. Thus, Independent Producers must continue to comply with the exemption during those six months, and any transactions that do not meet the terms of the exemption will be subject to excise tax and ERISA penalties. The ineligibility remains in effect until the earliest of: a subsequent judgement reversing a person's conviction, 10 years after the person became ineligible or is released from imprisonment, if later, or the Department grants an individual exemption permitting reliance on this exemption, notwithstanding the conviction.

Section VIII(b) delineates similarly eligibility provisions for Insurers. An entity will be ineligible to serve as an Insurer with respect to the exemption if it has a conviction for a crime listed under Section VIII(b)(1) or has been determined to be

ineligible under Section VIII(b)(2). Furthermore, because Insurers that fail to satisfy the conditions of this exemption would not necessarily engage in a non-exempt prohibited transaction, their eligibility to rely on this exemption would not be linked to engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B). The Department notes that, as a fiduciary, before recommending an insurance product the Independent Producer is responsible for ensuring that the relevant insurance company is an Insurer permitted to sell its products through Independent Producers and Section VIII. The Independent Producer may reasonably rely on an Insurer's representations to it regarding the Insurer's continued eligibility under the exemption.

Insurers would become ineligible six months after the conviction date, the date of the Department's written determination regarding a foreign conviction, or the date of the Department's written ineligibility notice, as applicable. Unlike Independent Producers, Insurers might not be fiduciaries; therefore, they might not be subject to all fiduciary requirements during the six-month period. As fiduciaries, the Independent Producers should be aware of whether they are selling products of any Insurers that will become ineligible within six months. The ineligibility remains in effect until the earliest of: a subsequent judgement reversing a person's conviction, 10 years after the person became ineligible or is released from imprisonment, if later, or the Department grants an individual exemption permitting reliance on this exemption, notwithstanding the conviction.

Proposed Section VIII(c) would provide Independent Producers and Insurers with the opportunity to be heard. Like PTE 2020-02, there would be no separate evidentiary hearing following conviction by a U.S. federal or state court of competent jurisdiction,

but Section XVIII(c)(1) would allow Insurers and Independent Producers to submit a petition informing the Department of the conviction and seeking a determination that continued reliance on the exemption would not be contrary to the purposes of the exemption.

Proposed Section VIII(c)(2) would allow Independent Producers and Insurers to request an evidentiary hearing before becoming ineligible and losing access to the exemption. Before issuing a written ineligibility notice, the Department will issue a written warning to the Independent Producer or Insurer, as applicable, identifying specific conduct implicating proposed Section VIII(a)(2) or (b)(2), as applicable. The Insurer or Independent Producer then has a six-month opportunity to correct their conduct. At the end of the six-month period, if the Department determines that the Independent Producer or Insurer has not taken appropriate action to prevent recurrence of the disqualifying conduct, it will give the Independent Producer or Insurer the opportunity to be heard in person (including by phone or videoconference), in writing, or a combination thereof, before the Department issues the written ineligibility notice. The opportunity to be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences.

Following a hearing for either foreign convictions or other misconduct, the Department's determination will be based solely on its discretion. The Department will consider the following when making its determination:

- the gravity of the offense;
- the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy;
- recency of the conduct at issue;
- any remedial measures the Independent Producer or Insurer has taken upon learning of the underlying conduct; and

- other factors the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption.

If the Department issues a written ineligibility notice, the notice will articulate the basis for the Department's determination that the Independent Producer or Insurer engaged in conduct described in Section VIII(a)(2).

If an Insurer or Independent Producer is ineligible to rely on amended PTE 84-24, proposed Section VIII(d) provides that the Insurer or Independent Producer may rely on a statutory or separate administrative prohibited transaction exemption if one is available or seek an individual prohibited transaction exemption from the Department. The Department notes that PTE 2020-02 will generally be available for insurance companies that are ineligible to serve as Insurers under PTE 84-24. However, the Department may, as part of its eligibility determination process, determine that an entity is not eligible for either PTE 2020-02 or PTE 84-24. The written warning, opportunity to be heard, and written ineligibility notice would each clearly state the exemption or exemptions for which ineligibility was being considered.

If an Insurer cannot sell its products under PTE 84-24, the Department would consider an application for an individual exemption for that Insurer, and any resulting exemption would likely require the Insurer to be a fiduciary and acknowledge fiduciary status. If an applicant seeks retroactive relief in connection with an exemption application, the Department will consider the application in accordance with its retroactive exemption policy.<sup>19</sup> The Department may require additional prospective compliance conditions as a condition of retroactive relief. The Department requests comments on the process described above, including whether it would be helpful to provide greater details about the evidentiary hearing and the written ineligibility notice, and, if so, what details are necessary.

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<sup>19</sup> Set forth in 29 CFR 2570.35(d).

## **Recordkeeping**

As discussed above, the Department is proposing to add a new Section IX to PTE 84-24, which would require the party engaging in a transaction covered by the exemption to maintain records necessary to enable certain persons (described in proposed Section IX(a)(2)) to determine whether the conditions of this exemption have been met. This provision would apply to all of the conditions of PTE 84-24, replacing the more limited existing recordkeeping requirement in current Section V(e). This proposed recordkeeping requirement is consistent with PTE 2020-02 and is intended to protect the rights of plan participants and beneficiaries and IRA owners by ensuring that they and the Department have sufficient information to confirm that that exemption conditions have been satisfied.

## **Executive Order 12866 and 13563 Statement**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, as amended by Executive Order 14094, “significant” regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$200 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the

rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive Order. It has been determined that this proposal is a "significant regulatory action" within the scope of section 3(f)(1) of the Executive Order.

Therefore, the Department has provided an assessment of the proposal's potential costs, benefits, and transfers, and OMB has reviewed this proposed amendment pursuant to the Executive Order.

### **Paperwork Reduction Act**

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and Federal agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The Department is soliciting comments regarding the information collection request (ICR) included in the proposed amendments to the ICR. To obtain a copy of the ICR, contact the PRA addressee below or go to [RegInfo.gov](https://www.reginfo.gov). The Department has submitted a copy of the rule to the OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronically delivered responses).

Commenters may send their views on the Departments' PRA analysis in the same way they send comments in response to the proposed rule as a whole (for example, through the [www.regulations.gov](http://www.regulations.gov) website), including as part of a comment responding to the broader proposed rule. Comments are due by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**] to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to James Butikofer, Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N-5718, Washington, DC 20210, or [ebssa.opr@dol.gov](mailto:ebssa.opr@dol.gov). ICRs also are available at <http://www.RegInfo.gov> (<http://www.reginfo.gov/public/do/PRAMain>).

As discussed in detail above, PTE 84-24, as amended, would exclude investment advice fiduciaries from the existing relief provided in Section II, which would be redesignated as Section II(a) and add new Sections VI-VIII, which would provide relief for investment advice limited to the narrow category of transactions in which an independent, insurance-only agent, or Independent Producer, provides investment advice

to a Retirement Investor regarding an annuity or insurance contract. Additionally, as amended, the exemption requires the Independent Producers engaging in these transactions to adhere to certain Impartial Conduct Standards, including acting in the best interest of the plans and IRAs when providing advice.

Financial institutions and investment professionals that engage in all other investment advice transactions, including those involving captive or career insurance agents would rely on PTE 2020-02 to receive exemptive relief for investment advice transactions. The amendment would revise the recordkeeping requirements for all entities relying on PTE 84-24. Additionally, for Independent Producers, the exemption would require entities to make certain new disclosures, conduct an annual retrospective review, and comply with policy and procedure requirements.

These requirements are ICRs subject to the PRA. Readers should note that the burden discussed below conforms to the requirements of the PRA and is not the incremental burden of the changes.<sup>20</sup>

### **1.1 Preliminary Assumptions**

In the analysis discussed below, a combination of personnel would perform the tasks associated with the ICRs at an hourly wage rate of \$158.94 for an Independent Producer, \$63.45 for clerical personnel, and \$159.34 for a legal professional, and \$128.11 for a senior executive.<sup>21</sup>

The Department does not have information on how many Retirement Investors, including plan beneficiaries and participants and IRA owners, receive disclosures electronically from investment advice fiduciaries. For the purposes of this analysis, the

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<sup>20</sup> For a more detailed discussion of the marginal costs associated with the proposed amendments to PTE 84-24, refer to the Notice of Proposed Rulemaking published elsewhere in today's edition of the Federal Register.

<sup>21</sup> Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.



Department assumes that the percent of Retirement Investors receiving disclosures electronically would be similar to the percent of plan participants receiving disclosures electronically under the Department's 2020 electronic disclosure rules.<sup>22</sup> Accordingly, the Department estimates that 94.2 percent of the disclosures sent to Retirement Investors would be sent electronically, and the remaining 5.8 percent would be sent by mail.<sup>23</sup> The Department requests comment on these assumptions.

The Department assumes any documents sent by mail would be sent by First Class Mail, incurring a postage cost of \$0.66 for each piece of mail.<sup>24</sup> Additionally, the Department assumes that documents sent by mail would incur a material cost of \$0.05 for each page.

## **1.2 Costs Associated with Satisfying Conditions for Transactions Described in Section III(a)-(f)**

Insurance agents and brokers, pension consultants, insurance companies, and investment company principal underwriters are expected to continue to take advantage of the exemption for transactions described in Section III(a)-(f). The Department estimates that 2,986 insurance agents and brokers, pension consultants, and insurance companies will continue to take advantage of the exemption for transactions described in Section III(a)-(f). This estimate is based on the following assumptions:

- According to the Insurance Information Institute, in 2022, there were 3,328 captive agents, which are insurance agents who work for only one insurance company.<sup>25</sup> The Insurance Information Institute also found that life and annuity

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<sup>22</sup> 67 FR 17263 (Apr. 9, 2002).

<sup>23</sup> The Department estimates approximately 94.2% of Retirement Investors receive disclosures electronically, which is the sum of the estimated share of Retirement Investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2%) and the estimated share of Retirement Investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36.0%).

<sup>24</sup> United States Post Service, *First-Class Mail*, (2023), <https://www.usps.com/ship/first-class-mail.htm>.

<sup>25</sup> Insurance Information Institute, *A Firm Foundation: How Insurance Supports the Economy - Captives by State, 2021-2022*, <https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/a-50-state-commitment/captives-by-state> (last visited August 25, 2023).

insurers accounted for 47.4 percent of all net premiums for the insurance industry in 2022.<sup>26</sup> Thus, the Department estimates there are 1,577 insurance agents and brokers relying on the existing provisions.<sup>27</sup>

- The Department expects that pension consultants would continue to rely on the existing PTE 84-24. Based on 2021 Form 5500 data, the Department estimates that 1,011 pension consultants serve the retirement market.<sup>28</sup>
- In the Department's 2016 Regulatory Impact Analysis, it estimated that 398 insurance companies wrote annuities.<sup>29</sup> The Department requests information on how the number of insurance companies underwriting annuities has changed since then.

In addition, investment company principals may rely on the exemption. In the Department's experience, investment company principal underwriters almost never use PTE 84-24. Therefore, the Department assumes that 20 investment company principal underwriters will engage in one transaction annually under PTE 84-24, 10 of which are assumed to service plans and 10 are assumed to service IRAs.

The Department requests comments on how many entities currently rely on PTE 84-24 for transactions that do not involve investment advice and would continue to rely on the exemption as amended.

Further, the Department estimates that there are approximately 765,124 ERISA

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<sup>26</sup> Insurance Information Institute, *Facts + Statistics: Industry Overview- Insurance Industry at-a-Glance*, <https://www.iii.org/fact-statistic/facts-statistics-industry-overview>.

<sup>27</sup> The number of captive insurance agents is estimated as: (3,328 captive agents x 47.4%) = 1,577 captive insurance agents serving the annuity market.

<sup>28</sup> Internal Department of Labor calculations based on the number of unique service providers listed as pension consultants on the 2021 Form 5500 Schedule C.

<sup>29</sup> This estimate is based on 2014 data from SNL Financial on life insurance companies that reported receiving either individual or group annuity considerations. (See Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.)

covered pension plans<sup>30</sup> and approximately 67.8 million IRAs.<sup>31</sup> The Department estimates that 7.5 percent of plans are new accounts or new financial advice relationships<sup>32</sup> and that 3 percent of plans will use the exemption for covered transactions.<sup>33</sup> Based on these assumptions, the Department estimates that 1,722 plans would be affected by the proposed amendments to PTE 84-24.<sup>34</sup>

The proposed amendments to 84-24 would also affect new IRA accounts. The Department does not have data on the number of new IRA accounts that are opened each year. However, in 2022, of the 67.8 million IRA owners, 1.4 million, or approximately 2.1 percent, opened an IRA for the first time.<sup>35</sup> Inferring from this statistic, the Department estimates that 2.1 percent of IRA accounts are new each year. The Department acknowledges that some IRA owners may have multiple IRAs, and as such, this statistic may underestimate the percentage of new IRAs opened.<sup>36</sup> Additionally, the Department estimates that about 3 percent of these new IRAs, or approximately 52,000 IRAs, would use PTE 84-24 for covered transactions.<sup>37</sup>

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<sup>30</sup> Employee Benefits Security Administration, United States Department of Labor, *Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports*, Table A1 (2023; forthcoming).

<sup>31</sup> Cerulli Associates, *2023 Retirement-End Investor*, Exhibit 5.12. The Cerulli Report, (2023).

<sup>32</sup> EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

<sup>33</sup> In 2020, 7 percent of traditional IRAs were held by insurance companies. (See Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020*, 27(1) ICI Research Perspective (2021), <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>.) This number has been adjusted downward to 3 percent to account for the fact that some transactions are not covered by this exemption.

<sup>34</sup>  $765,124 \text{ plans} \times 7.5 \text{ percent of plans are new} \times 3 \text{ percent of plans with relationships with insurance agents or pension consultants} = 1,722 \text{ plans}$ .

<sup>35</sup> Cerulli Associates, *U.S. Retirement End-Investor 2023: Fostering Comprehensive Relationships*, The Cerulli Report.

<sup>36</sup> The Department lacks data on the number of IRA owners that own multiple IRAs. To provide scope of magnitude, one source reported that in 2019, 19 percent of IRA owners contributed to both a traditional IRA and Roth IRA. (See Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020*, 27(1) ICI Research Perspective (2021), <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>.) This statistic does not account for individuals who own multiple IRAs of each type or those who did not contribute in 2019, but it provides a lower bound.

<sup>37</sup> In 2020, 7 percent of traditional IRAs were held by insurance companies. (See Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020*, 27(1) ICI Research Perspective (2021), <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>.) This number has been adjusted downward to 3 percent to reflect the removal of transactions not covered by this exemption. The number of IRAs affected is estimated as:  $(83,252,750 \text{ IRAs} \times 2.1\% \text{ IRAs assumed to be new IRAs} \times 3\% \text{ of IRAs held by insurance companies}) = 52,449 \text{ IRAs}$

The proposed amendment would exclude entities currently relying on the exemption, under the existing provisions for investment advice. As such, the Department acknowledges that the estimates discussed above may overestimate the entities able to rely on the exemption for relief for the transactions described in Section III(a)-(f). The Department requests comment or data on whether the relief in proposed Section II(a) for the covered transactions in Section III(a)-(f) would still be utilized after investment advice is excluded.

#### **1.2.1. Written Authorization from the Independent Plan Fiduciary**

Based on the estimates discussed above, the Department estimates that authorizing fiduciaries for 1,722 plans and authorizing fiduciaries for 52,449 IRA holders would be required to send an advance written authorization to the 2,996 financial institutions for IRAs<sup>38</sup> for exemptive relief for the transactions described in Section III(a)-(f).

In the plan universe, it is assumed that a legal professional would spend five hours per plan reviewing the disclosures and preparing an authorization form. In the IRA universe, it is assumed that a legal professional working on behalf of the financial institution for IRAs will spend three hours drafting an authorization form for IRA holders to sign. This results in an hour burden of 17,598 hours with an equivalent cost of \$2.8 million.<sup>39</sup>

The Department expects that plans will send the written authorization through already established electronic means, and thus, the Department does not expect plans to incur any cost to send the authorization. The Department expects that 94.2 percent of written authorization for IRAs will be sent electronically at no additional burden. The

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<sup>38</sup> This includes 2,986 insurance agents and brokers, pension consultants, and insurance companies and 10 investment company underwriters servicing IRAs.

<sup>39</sup> The burden is estimated as: (1,722 plans x 5 hours) + (2,996 financial institutions x 3 hours) = 17,598 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,722 plans x 5 hours) + (2,996 financial institutions x 3 hours)] x \$159.34 per hour = \$2,804,065.

remaining 5.8 percent of authorizations will be mailed. For paper authorizations, the Department assumes that clerical staff will spend two minutes preparing and sending the authorization resulting in an hour burden of approximately 101 hours with an equivalent cost of \$6,434.<sup>40</sup>

In total, as presented in the table below, the written authorization requirement, under the new conditions of relief, is expected to result in an annual total hour burden of 17,699 hours with an equivalent cost of \$2,810,499.

<b>Table 1: Hour Burden and Equivalent Cost Associated with the Written Authorization</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	17,598	\$2,804,065	17,598	\$2,804,065
Clerical	101	\$6,434	101	\$6,434
<b>Total</b>	<b>17,699</b>	<b>\$2,810,499</b>	<b>17,699</b>	<b>\$2,810,499</b>

The Department assumes 5.8 percent of authorizations for IRAs would be distributed by mail and that the authorization will include two pages. Accordingly, the Department estimates an annual cost burden of approximately \$2,312.<sup>41</sup>

<b>Table 2: Material and Postage Cost Associated with the Written Authorization</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Pages</b>	<b>Cost</b>	<b>Pages</b>	<b>Cost</b>
Material and Postage Cost	2	\$2,312	2	\$2,312
<b>Total</b>	<b>2</b>	<b>\$2,312</b>	<b>2</b>	<b>\$2,312</b>

<sup>40</sup> The burden is estimated as:  $((52,449 \text{ IRAs} \times 5.8 \text{ percent paper} \times 2 \text{ minutes per plan}) \div 60 \text{ minutes}) = 101$  hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation:

$((52,449 \text{ IRAs} \times 5.8 \text{ percent paper} \times 2 \text{ minutes per plan}) \div 60 \text{ minutes}) \times \$63.45 \text{ per hour} = \$6,434.$

<sup>41</sup> The material cost is estimated as:  $(52,449 \text{ IRA authorizations} \times 5.8 \text{ percent paper}) \times [\$0.66 + (\$0.05 \times 2)] = \$2,312.$

### 1.2.2 Disclosure

Based on the estimates discussed above, the Department estimates that approximately 3,006 financial institutions<sup>42</sup> would continue to utilize the exemption for exemptive relief for the transactions described in Section III(a)-(f) for each plan and IRA. In total, the Department estimates that 2,996 entities would prepare disclosures for plans and 2,996 entities would prepare disclosures for IRAs. The Department assumes that an in-house attorney will spend one hour of legal staff time drafting the disclosure for plans and one hour of legal staff time drafting the disclosure for IRAs. This results in an hour burden of 5,992 hours with an equivalent cost of \$954,765.<sup>43</sup>

The Department expects that the disclosures for plans would be distributed through already established electronic means, and thus, the Department does not expect plans to incur any cost to send the disclosures. The Department expects that 94.2 percent of disclosures for IRAs will be sent electronically at no additional burden. The remaining 5.8 percent of authorizations will be mailed. For paper copies, a clerical staff member is assumed to require two minutes to prepare and mail the required information to the plan fiduciary. This information will be sent to the 52,449 IRAs plus the 10 investment company principal underwriters for IRAs entering into an agreement with an insurance agent, pension consultant, or mutual fund principal underwriter, and based on the above, the Department estimates that this requirement results in an hour burden of 84 hours with an equivalent cost of \$6,435.<sup>44</sup>

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<sup>42</sup> This includes 2,986 insurance agents and brokers, pension consultants, and insurance companies and 20 investment company underwriters servicing plans and IRAs.

<sup>43</sup> The burden is estimated as:  $[2,996 \text{ financial institutions} \times (1 \text{ hour for plans} + 1 \text{ hour for IRAs})] = 5,992 \text{ hours}$ . A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation:  $[2,996 \text{ financial institutions} \times (1 \text{ hour for plans} + 1 \text{ hour for IRAs})] \times \$159.34 \text{ per hour} = \$954,765$ .

<sup>44</sup> The burden is estimated as:  $\{[(52,449 \text{ IRAs} + 10 \text{ investment company principal underwriters for IRAs}) \times 5.8 \text{ percent paper} \times 2 \text{ minutes}] \div 60 \text{ minutes} = 101 \text{ hours}$ . A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation:  $\{[(52,449 \text{ IRAs} + 10 \text{ investment company principal underwriters for IRAs}) \times 5.8 \text{ percent paper} \times 2 \text{ minutes}] \div 60 \text{ minutes}\} \times \$63.45 = \$6,435$ .

In total, as presented in the table below, providing the pre-authorization materials is expected to impose an annual total hour burden of 6,093 hours with an equivalent cost of \$961,200.

<b>Table 3: Hour Burden and Equivalent Cost Associated with the Disclosure</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	5,992	\$954,765	5,992	\$954,765
Clerical	101	\$6,435	101	\$6,435
<b>Total</b>	<b>6,093</b>	<b>\$961,200</b>	<b>6,093</b>	<b>\$961,200</b>

The Department assumes that this information will include seven pages with 94.2 percent of disclosures distributed electronically through traditional electronic methods at no additional burden, and the remaining 5.8 percent of disclosures will be mailed. Accordingly, the Department estimates an annual cost burden of approximately \$2,313.<sup>45</sup>

<b>Table 4: Material and Postage Cost Associated with the Disclosure</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
	<b>Pages</b>	<b>Equivalent Burden Cost</b>	<b>Pages</b>	<b>Equivalent Burden Cost</b>
Material and Postage Cost	7	\$2,313	7	\$2,313
<b>Total</b>	<b>7</b>	<b>\$2,313</b>	<b>7</b>	<b>\$2,313</b>

### **1.3 Costs Associated with Satisfying Conditions for Transactions Described in Section III(g)**

The amendment would provide investment advice fiduciaries with relief for Independent Producers for transactions in which the Independent Producer receives an insurance sales commission as a result of the provision of investment advice, regarding the purchase of an annuity contract of a financial institution that is not an Affiliate. The Department expects that the financial institutions covered by this proposal would be insurance companies that directly write annuities. The proposed amendments outline

<sup>45</sup> The material cost is estimated as: [(52,449 IRA authorizations + 10 investment company principal underwriters for IRAs) x 5.8 percent paper] x [\$0.66 + (\$0.05 x 7)] = \$2,313.

conditions pertaining to disclosure, policies and procedures, and retrospective reviews that need to be satisfied to rely on the exemption. These conditions are tailored to protect Retirement Investors from the specific conflicts that arise for Independent Producers when providing investment advice to Retirement Investors regarding the purchase of an annuity.

The Independent Insurance Agents and Brokers of America estimated that there were 40,000 Independent Producers in 2022.<sup>46</sup> The Department does not have data on what percent of Independent Producers service the retirement market. For the purposes of this analysis, the Department assumes that 10 percent, or 4,000, of these Independent Producers service the retirement market. The Department requests comment on this assumption.

Insurance companies are primarily regulated by states and no single regulator records a nationwide count of insurance companies. Although state regulators track insurance companies, the total number of insurance companies cannot be calculated by aggregating individual state totals, because individual insurance companies often operate in multiple states. In the Department's 2016 Regulatory Impact Analysis, it estimated that 398 insurance companies wrote annuities.<sup>47</sup> The Department requests information on how the number of insurance companies underwriting annuities has changed since then.

Some of these insurance companies may not sell any annuity contracts in the IRA or plans. Because of these data limitations, the Department includes all 398 insurance companies in its cost estimate, though this likely represents an upper bound.

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<sup>46</sup> Annemarie McPherson Spears, *7 Findings From the 2022 Agency Universe Study*, (October 13, 2022), [https://www.iamagazine.com/news/7-findings-from-the-2022-agency-universe-study?\\_\\_hstc=79369803.5fd6a87d75ca95f942e9dc33fed281b9.1691447156981.1691447156981.1691447156981.1&\\_\\_hssc=79369803.3.1691447156981&\\_\\_hsfp=2180945085](https://www.iamagazine.com/news/7-findings-from-the-2022-agency-universe-study?__hstc=79369803.5fd6a87d75ca95f942e9dc33fed281b9.1691447156981.1691447156981.1691447156981.1&__hssc=79369803.3.1691447156981&__hsfp=2180945085).

<sup>47</sup> This estimate is based on 2014 data from SNL Financial on life insurance companies reported receiving either individual or group annuity considerations. (See *Conflict of Interest Final Rule, Regulatory Impact Analysis for Final Rule and Exemptions*, U.S. Department of Labor (April 2016), [www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf](http://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf)).



Insurance companies sell insurance products through (1) captive insurance agents that work for an insurance company as employees or as independent contractors who exclusively sell the insurance company's products and (2) independent agents who sell multiple insurance companies' products. In recent years, the market has seen a shift away from captive distribution toward independent distribution.<sup>48</sup>

The Department does not have data on the number of insurance companies using captive agents or Independent Producers. Based on data on the sales of individual annuities by distribution channel, the Department estimates that approximately 46 percent of insurance companies underwriting annuities sell annuities through captive distribution channels, while 54 percent sell annuities through independent distribution channels.<sup>49</sup> For the purposes of this analysis, the Department estimates that 215 insurance companies distribute annuities through independent channels and would rely on PTE 84-24 for transactions involving investment advice.<sup>50</sup>

The Department estimates that 70 of the 398 insurance companies are large entities.<sup>51</sup> For the purposes of this analysis, the Department assumes the percent of small insurance companies using each distribution channel is the same as for all insurance

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<sup>48</sup> Ramnath Balasubramanian, Rajiv Dattani, Asheet Mehta, & Andrew Reich, *Unbundling Value: How Leading Insurers Identify Competitive Advantage*, McKinsey & Company, (June 2022), <https://www.mckinsey.com/industries/financial-services/our-insights/unbundling-value-how-leading-insurers-identify-competitive-advantage>; Sheryl Moore, *The Annuity Model Is Broken*, Wink Intel, (June 2022), <https://www.winkintel.com/2022/06/the-annuity-model-is-broken-reprint/>.

<sup>49</sup> According to the Insurance Information Institute, in 2022, 20 percent of individual annuities were sold through independent broker-dealers, 18 percent through independent agents, 15 percent through career agents, 24 percent through banks, 17 percent through full-service national broker-dealers, 3 percent through direct-response, and 2 percent through other methods. For the purposes of this analysis, the Department considers those sales made by career agents and full-service national broker-dealers to be "captive," and those made by independent broker-dealers and independent agents to be "independent." The Department assumes that 46 percent of sales by banks are captive, while 54 percent of sales by banks are independent. As such, the Department assumes that 46 percent of sales are sold through captive channels  $\{[15\% + 17\% + (46\% \times 24\%)] / (100\% - 6\%)\}$ , while 54 percent of sales are sold through independent channels  $\{[20\% + 18\% + (54\% \times 24\%)] / (100\% - 6\%)\}$ .

<sup>50</sup> The number of insurance companies using captive distribution channels is estimated as  $(398 \times 46\%) = 183$  insurance companies. The number of insurance companies using independent distribution channels is estimated as  $(398 - 183) = 215$  insurance companies.

<sup>51</sup> LIMRA estimates that, in 2016, 70 insurers had more than \$38.5 million in sales, which is the Small Business Administration's threshold for a large entity within the insurance industry. (See LIMRA, *U.S. Individual Annuity Yearbook: 2016 Data*, LIMRA Secure Retirement Institute (2017)).

companies. That is, the Department assumes that 46 percent of insurance companies (183 insurance companies) sell annuities through captive distribution channels, of which 151 are estimated to be small insurance companies and the remaining 32 large insurance companies.<sup>52</sup> Additionally, 54 percent (215 insurance companies) sell annuities through independent distribution channels, of which 177 are estimated to be small insurance companies and the remaining 38 are large.<sup>53</sup> The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel. The Department requests comment on how many insurance companies sell annuities through captive and independent distribution channels. The Department also requests comment on whether, or how many, insurance companies may rely on both methods of distribution.

### **1.3.1 Disclosures**

As discussed above, the Department assumes that 4,000 Independent Producers service the retirement market, selling the products of 215 insurance companies. For more generalized disclosures, the Department assumes that insurance companies would prepare and provide disclosures to Independent Producers selling their products. However, some of the disclosures are tailored specifically to the Independent Producer. The Department assumes that these disclosures would need to be prepared by the Independent Producer themselves. The Department recognizes that some may rely on intermediaries in the distribution channel to prepare more specific disclosures; however, the Department expects that the costs associated with the preparation would be covered by commissions retained by the intermediary for its services.

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<sup>52</sup> The number of large insurance companies using a captive distribution channel is estimated as: (70 large insurance companies x 46%) = 32 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: (183 insurance companies – 32 large insurance companies) = 151 small insurance companies.

<sup>53</sup> The number of large insurance companies using an independent distribution channel is estimated as: (70 large insurance companies x 54%) = 38 insurance companies. The number of small insurance companies using an independent distribution channel is estimated as: (215 insurance companies – 38 large insurance companies) = 177 small insurance companies.

1.3.1.1. Written Acknowledgement that the Independent Producer is a Fiduciary  
by the Independent Producer

The Department is including a model statement in the preamble to PTE 84-24 that details what should be included in a fiduciary acknowledgment for financial institutions.<sup>54</sup> The Department assumes that the time associated with preparing the disclosures would be minimal. Further, these disclosures are expected to be uniform in nature. Accordingly, the Department estimates that these disclosures would not take a significant amount of time to prepare.

Due to the nature of Independent Producers, the Department assumes that most financial institutions would make draft disclosures available to Independent Producers pertaining to their fiduciary status. However, the Department expects that a small percentage of Independent Producers may draft their own disclosures. The Department assumes that an in-house attorney for all 215 financial institutions as well as 5 percent of Independent Producers, or 200 Independent Producers, would spend 10 minutes of legal staff time to produce a written acknowledgement in the first year. This results in an estimated hour burden of approximately 69 with an equivalent cost of \$11,021 in the first year.<sup>55</sup>

<b>Table 5: Hour Burden and Equivalent Cost Associated with the Fiduciary Acknowledgement</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	69	\$11,021	0	\$0
<b>Total</b>	<b>69</b>	<b>\$11,021</b>	<b>0</b>	<b>\$0</b>

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<sup>54</sup> 85 FR 82798, 82827 (Dec. 18, 2020). The model statement was also included in Frequently Asked Questions in April 2021, New Fiduciary Advice Exemption: PTE 2020-02 *Improving Investment Advice for Workers & Retirees* Frequently Asked Questions, Q13, (April 2021), <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf>.

<sup>55</sup> The burden is estimated as:  $\{[(215 \text{ financial institutions} + 200 \text{ Independent Producers}) \times (10 \text{ minutes})] \div 60 \text{ minutes}\} = 69 \text{ hours}$ . A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation:  $\{[(215 \text{ financial institutions} + 200 \text{ Independent Producers}) \times (10 \text{ minutes})] \div 60 \text{ minutes}\} \times \$159.34 = \$11,021$ .

### 1.3.1.2 Written Statement of the Best Interest Standard of Care Owed by the Independent Producer

As discussed above, the Department assumes that 4,000 Independent Producers service the retirement market, selling the products of 215 financial institutions. Due to the nature of Independent Producers, the Department assumes that most financial institutions would make draft disclosures available to Independent Producers, pertaining to the annuities they offer. The Department assumes that an in-house attorney for all 215 financial institutions as well as 5 percent of Independent Producers, or 200 Independent Producers, would spend 30 minutes of legal staff time to prepare the statement in the first year. This results in an hour burden of 208 hours with an equivalent cost of \$33,063 in the first year.<sup>56</sup>

<b>Table 6: Hour Burden and Equivalent Cost Associated with the Written Statement of the Best Interest Standard of Care Owed</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	208	\$33,063	0	\$0
<b>Total</b>	<b>208</b>	<b>\$33,063</b>	<b>0</b>	<b>\$0</b>

### 1.3.1.2. Written Description of the Services Provided and the Products the Independent Producer is Licensed and Authorized to Sell

As discussed above, the Department assumes that 4,000 Independent Producers service the retirement market, selling the products of 215 insurance companies. For disclosures tailored more specifically to an individual Independent Producer, the Department assumes that the disclosure would need to be prepared by the Independent Producer. The Department recognizes that many Independent Producers may not have the internal resources to prepare such disclosure. The Department expects that some may rely

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<sup>56</sup> The burden is estimated as:  $\{[(215 \text{ financial institutions} + 200 \text{ Independent Producers}) \times (30 \text{ minutes})] \div 60 \text{ minutes}\} = 208 \text{ hours}$ . A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation:  $\{[(215 \text{ financial institutions} + 200 \text{ Independent Producers}) \times (30 \text{ minutes})] \div 60 \text{ minutes}\} \times \$159.34 = \$33,063$ .

on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation would be covered by commission retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost back to the Independent Producer. The Department requests comment on this assumption.

Accordingly, the Department assumes that all 4,000 Independent Producers in this analysis would need to prepare the disclosure. The Department assumes that, for each of these Independent Producers, an attorney would spend 30 minutes of legal staff time drafting the written description. This results in an hour burden of 2,000 hours with an equivalent cost of \$318,680 in the first year.<sup>57</sup>

<b>Table 7: Hour Burden and Equivalent Cost Associated with the Written Description of Service Provided</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	2,000	\$318,680	0	\$0
<b>Total</b>	<b>2,000</b>	<b>\$318,680</b>	<b>0</b>	<b>\$0</b>

#### 1.3.1.4. A Written Statement of the Independent Producer’s Material Conflicts of Interest and the Amount of the Insurance Commission that Would be Paid to the Independent Producer in Connection with the Purchase by a Retirement Investor of the Recommended Annuity

As discussed above, for disclosures tailored more specifically to an individual Independent Producer, the Department assumes that the disclosure would need to be prepared by the Independent Producer. The Department recognizes that many Independent Producers may not have the internal resources to prepare such disclosure,

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<sup>57</sup> The burden is estimated as: (4,000 Independent Producers x 0.5 hours) = 2,000 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (4,000 Independent Producers x 0.5 hours) x \$159.34 = \$318,680.

however they may already have a similar statement to satisfy other legal requirements. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation would be covered by the commission retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost back to the Independent Producer. The Department requests comment on this assumption.

Accordingly, the Department assumes that all 4,000 Independent Producers in this analysis would need to prepare the disclosure. The Department assumes that, for each of these entities, an attorney would spend one hour of legal staff time drafting the written description. This results in an hour burden of 4,000 hours with an equivalent cost of \$637,360 in the first year.<sup>58</sup>

<b>Table 8: Hour Burden and Equivalent Cost Associated with the Written Statement of the Independent Producer's Material Conflicts of Interest</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	4,000	\$637,360	0	\$0
<b>Total</b>	<b>4,000</b>	<b>\$637,360</b>	<b>0</b>	<b>\$0</b>

#### 1.3.1.5 Before Recommending an Annuity, Engaging in a Rollover, or Making a Recommendation to a Plan Participant as to the Post-Rollover Investment of Assets Currently Held in a Plan, the Independent Producer Must Document Its Conclusions as to Whether a Rollover Is in the Investor's Best Interest

The proposed amendment would require an Independent Producer to provide a disclosure to investors that documents their consideration as to whether a recommended annuity or rollover is in the Retirement Investor's best interest. Due to the nature of this

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<sup>58</sup> The burden is estimated as: (4,000 Independent Producers x 1 hour) = 4,000 hours. A labor rate of approximately \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (4,000 hours x \$159.34) = \$637,360.

disclosure, the Department assumes that the content of the disclosure would need to be prepared by the Independent Producer. The Department recognizes that some may rely on intermediaries in the distribution channel, and some may seek external legal support to assist with drafting the disclosures. However, the Department expects that most Independent Producers would prepare the disclosure themselves. The Department requests comment on this assumption.

For the purposes of this analysis, the Department uses its estimate for the number of new IRA accounts held by insurance companies as a proxy for the number of Retirement Investors that have relationships with Independent Producers that would engage in transactions covered under the exemption. As such, the Department estimates that 52,449 Retirement Investors would receive documentation on whether the recommended annuity is in their best interest each year.<sup>59</sup>

The Department assumes that, for each of these Retirement Investors, an Independent Producer would spend one hour of a financial manager's time drafting the documentation. This results in an estimated hour burden of 52,449 hours with an equivalent cost of \$8.3 million annually.<sup>60</sup>

<b>Table 9: Hour Burden and Equivalent Cost Associated with the Rollover Documentation</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Insurance Sales Agent	52,449	\$8,336,244	52,449	\$8,336,244
<b>Total</b>	<b>52,449</b>	<b>\$8,336,244</b>	<b>52,449</b>	<b>\$8,336,244</b>

<sup>59</sup> In 2020, 7 percent of traditional IRAs were held by insurance companies. (See Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020*, 27(1) *ICI Research Perspective* (2021). <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>.) This number has been adjusted downward to 3 percent to reflect the removal of transactions not covered by this exemption.). The number of IRAs affected is estimated as: (83,252,750 IRAs x 2.1% IRAs assumed to be new IRAs x 3% of IRAs held by insurance companies) = 52,449 IRAs.

<sup>60</sup> The burden is estimated as: (52,449 rollovers x 1 hour) = 52,449 hours. A labor rate of approximately \$158.94 is used for an Independent Producer. The labor rate is applied in the following calculation: (52,449 rollovers x 1 hour) x \$158.94 = \$8,336,244.

### 1.3.1.6 Mailing Cost for Disclosures Sent from Independent Producers to Retirement Investors

As discussed at the beginning of the cost section, The Department assumes that 5.8 percent of disclosures would be mailed. Accordingly, of the estimated 52,449 affected Retirement Investors, 3,042 Retirement Investors are estimated to receive paper disclosures.<sup>61</sup> For paper copies, a clerical staff member is assumed to require five minutes to prepare and mail the required information to the Retirement Investor. This requirement results in an estimated hour burden of 254 hours with an equivalent cost of \$16,085.<sup>62</sup>

<b>Table 10: Hour Burden and Equivalent Cost Associated with Preparing the Disclosures</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Clerical	254	\$16,085	254	\$16,085
<b>Total</b>	<b>254</b>	<b>\$16,085</b>	<b>254</b>	<b>\$16,085</b>

The Department assumes that this information would include seven pages, resulting in an annual cost burden for material and paper costs of \$3,072.<sup>63</sup>

<b>Table 11: Material Cost Associated with the Disclosures</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Pages</b>	<b>Equivalent Burden Cost</b>	<b>Pages</b>	<b>Equivalent Burden Cost</b>
Cost	7	\$3,072	7	\$3,072
<b>Total</b>	<b>7</b>	<b>\$3,072</b>	<b>7</b>	<b>\$3,072</b>

Additionally, Independent Producers would be required to send the documentation to the insurance company. The Department expects that such documentation would be sent electronically and result in a de minimis burden. The Department requests comment on this assumption.

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<sup>61</sup> This is estimated as:  $(52,449 \text{ Retirement Investors} \times 5.8\%) = 3,042$  paper disclosures.

<sup>62</sup> This is estimated as:  $[(3,042 \text{ paper disclosures} \times 5 \text{ minutes}) \div 60 \text{ minutes}] = 254$  hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation:  $[(3,042 \text{ paper disclosures} \times 5 \text{ minutes}) \div 60 \text{ minutes}] \times \$63.45 = \$16,085$ .

<sup>63</sup> This is estimated as:  $3,042 \text{ rollovers resulting in a paper disclosure} \times [\$0.66 \text{ postage} + (\$0.05 \text{ per page} \times 7 \text{ pages})] = \$3,072$ .



### **1.3.2 Policies and Procedures**

1.3.2.1 Financial Institutions Must Establish, Maintain, and Enforce Written Policies and Procedures for the Review of Each Recommendation Before an Annuity is Issued to a Retirement Investor, and the Financial Institution Review its Policies and Procedures at Least Annually.

As discussed above, the Department estimates that 215 financial institutions would need to meet this requirement, of which 177 are estimated to be small and 38 are estimated to be large.<sup>64</sup> The Department assumes that, for each large insurance company, an in-house attorney would spend 10 hours of legal staff time drafting the written description, and for each small insurance company, an in-house attorney would spend 5 hours of legal staff time. This results in an hour burden of 1,265 hours with an equivalent cost of \$201,565 in the first year.<sup>65</sup>

In the following years, the Department assumes for each insurance company, an in-house attorney would spend two hours of legal staff time reviewing the policies and procedures. This results in an hour burden of 430 hours with an equivalent cost of \$68,516 in subsequent years.<sup>66</sup>

The proposed amendments would also require financial institutions to provide their complete policies and procedures to the Department upon request. As discussed above for PTE 2020-02, the Department estimates that it would request 165 policies and procedures in the first year and 50 in subsequent years. Assuming that the number of requests for the entities covered under PTE 2020-02 is equivalent to the number of

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<sup>64</sup> The number of large insurance companies using an independent distribution channel is estimated as:  $(70 \text{ large insurance companies} \times 54\%) = 38 \text{ insurance companies}$ . The number of small insurance companies using an independent distribution channel is estimated as:  $(215 \text{ insurance companies} - 38 \text{ large insurance companies}) = 177 \text{ small insurance companies}$ .

<sup>65</sup> This is estimated as:  $[(177 \text{ small insurance companies} \times 5 \text{ hours}) + (38 \text{ large insurance companies} \times 10 \text{ hours})] = 1,265 \text{ hours}$ . A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation:  $[(177 \text{ small insurance companies} \times 5 \text{ hours}) + (38 \text{ large insurance companies} \times 10 \text{ hours})] \times \$159.34 = \$201,565$ .

<sup>66</sup> This is estimated as:  $(215 \text{ insurance companies} \times 2 \text{ hours}) = 430 \text{ hours}$ . A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation:  $(215 \text{ insurance companies} \times 2 \text{ hours}) \times \$159.34 = \$68,516$ .

requests for the entities covered under PTE 84-24, the Department assumes that it will request two policies and procedures from insurers in the first year and one request in subsequent years, on average.<sup>67</sup> This results in an estimated cost of approximately \$32 in the first year<sup>68</sup> and \$16 in subsequent years.<sup>69</sup>

Insurers would also be required to review each of the Independent Producer's recommendations before an annuity is issued to a Retirement Investor to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. This requirement is consistent with the language in NAIC's 2010 Model Regulation 275, Suitability in Annuity Transactions,<sup>70</sup> and the 2020 revisions to Model Regulation 275, which expanded the suitability standard to a best interest standard.<sup>71</sup> Most states have adopted some form of the Model Regulation 275.<sup>72</sup> As such, the Department expects that reviewing recommendations before an annuity is issued is common industry practice. Accordingly, the Department expects that financial institutions would incur a de minimis burden to comply with the proposed amendments, when already complying with Model Regulation 275. The Department requests comment on this assumption.

<b>Table 12: Hour Burden and Equivalent Cost Associated with Policies and Procedures</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	1,265	\$201,565	430	\$68,516

<sup>67</sup> The number of requests in the first year is estimated as 215 insurance companies x (165 requests in PTE 2020-02 / 19,290 financial institutions in PTE 2020-02) = 2 requests. The number of requests in subsequent years is estimated as: 215 insurance companies x (50 requests in PTE 2020-02 / 19,290 financial institutions in PTE 2020-02) = 1 request.

<sup>68</sup> The burden is estimated as:  $[(2 \times 15 \text{ minutes}) \div 60 \text{ minutes}] = 0.5 \text{ hours}$ . A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation:  $[(2 \times 15 \text{ minutes}) \div 60 \text{ minutes}] \times \$63.45 = \$31.73$ .

<sup>69</sup> The burden is estimated as:  $[(1 \times 15 \text{ minutes}) \div 60 \text{ minutes}] = 0.25 \text{ hours}$ . A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation:  $[(1 \times 15 \text{ minutes}) \div 60 \text{ minutes}] \times \$63.45 = \$15.86$ .

<sup>70</sup> NAIC Model Suitability Regulations, § 6(F)(1)(d) (2010), <https://naic.soutrnglobal.net/Portal/Public/en-GB/RecordView/Index/25201>.

<sup>71</sup> NAIC Model Suitability Regulations, § 6(C)(1)(d) (2020), <https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf>.

<sup>72</sup> As of October of 2021, only three states had not adopted some form of Model Regulation 275. (See A.D. Banker & Company, *Annuity Best Interest State Map and FAQs*, (October 2021), <https://blog.adbanker.com/annuity-best-interest-state-map-and-faqs>).

<b>Table 12: Hour Burden and Equivalent Cost Associated with Policies and Procedures</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Clerical	1	\$32	1	\$16
<b>Total</b>	<b>1,266</b>	<b>\$201,597</b>	<b>430</b>	<b>\$68,532</b>

### **1.3.3. Retrospective Review**

The proposed amendment would require financial institutions to conduct a retrospective review at least annually. The review would be required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review would be required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. Financial institutions would also be required to provide the Independent Producer with the underlying methodology and results of the retrospective review.

#### **1.3.3.1. The Insurance Company Must Conduct a Retrospective Review, at Least Annually, for Each Independent Producer that Sells the Insurance Company's Annuity Contracts**

The Department estimates that 215 financial institutions would need to meet this requirement. For this requirement the information collection is documenting the findings of the retrospective review. The Department lacks data on, for a given insurance company, how many Independent Producers, on average, sell their annuities. For the purposes of this analysis, the Department assumes that, on average, each Independent Producer sells the products of three financial institutions. From each of these financial institutions, they may sell multiple products. As such, the Department assumes that each year, insurance companies would need to prepare a total of 12,000 retrospective

reviews,<sup>73</sup> or on average, each insurance company would need to prepare approximately 56 retrospective reviews.<sup>74</sup> The Department requests comment on this estimate. The Department assumes that, for each Independent Producer selling an insurance company's products, an in-house attorney at the insurance company would spend one hour of legal staff time, on average, drafting the retrospective review. This results in an estimated hour burden of 12,000 hours with an equivalent cost of \$1.9 million.<sup>75</sup>

<b>Table 13: Hour Burden and Equivalent Cost Associated with the Retrospective Review</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	12,000	\$1,912,080	12,000	\$1,912,080
<b>Total</b>	<b>12,000</b>	<b>\$1,912,080</b>	<b>12,000</b>	<b>\$1,912,080</b>

#### 1.3.3.2. Certification by the Senior Executive Officer of the Insurance Company

The Department assumes it would take a Senior Executive Officer 15 minutes to certify the report. This results in an annual hour burden of 3,000 hours with an equivalent cost of \$384,330.<sup>76</sup>

<b>Table 14: Hour Burden and Equivalent Cost Associated with the Certification by the Senior Executive Officer</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Senior Executive Officer	3,000	\$384,330	3,000	\$384,330
<b>Total</b>	<b>3,000</b>	<b>\$384,330</b>	<b>3,000</b>	<b>\$384,330</b>

<sup>73</sup> This is estimated as: (4,000 Independent Producers x 3 insurance companies covered) = 12,000 retrospective reviews.

<sup>74</sup> This is estimated as: (12,000 / 215) = 55.81 retrospective reviews, on average

<sup>75</sup> This is estimated as: (12,000 retrospective reviews x 1 hour) = 12,000 hours. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: (12,000 retrospective reviews x 1 hour) x \$159.34 = \$1,912,080.

<sup>76</sup> This is estimated as: [(12,000 retrospective reviews x 15 minutes) ÷ 60 minutes] = 3,000 hours. A labor rate of \$128.11 is used for a Senior Executive Officer. The labor rate is applied in the following calculation: [(12,000 retrospective reviews x 15 minutes) ÷ 60 minutes] x \$128.11 = \$384,330.

### 1.3.3.3. The Insurance Company Provides to the Independent Producer the Methodology and Results of the Retrospective Review

The Department assumes that the insurance company would provide the methodology and results electronically. The Department requests comment on this assumption. The Department estimates that it would take clerical staff five minutes to prepare and send each of the estimated 12,000 retrospective reviews. This results in an annual hour burden of 1,000 hours with an equivalent cost of \$63,450.<sup>77</sup> The Department expects that the results would be provided electronically, thus the Department does not expect there to be any material costs with providing Independent Producers with the retrospective review.

<b>Table 15: Hour Burden and Equivalent Cost Associated with the Provision of the Results of the Retrospective Review</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Clerical	1,000	\$63,450	1,000	\$63,450
<b>Total</b>	<b>1,000</b>	<b>\$63,450</b>	<b>1,000</b>	<b>\$63,450</b>

### 1.3.4. Recordkeeping Requirement

The proposed amendment would change the current recordkeeping requirements to incorporate a new provision that is similar to the recordkeeping provision in PTE 2020-02. This requirement would replace the more limited existing recordkeeping requirement in current version of PTE 84-24, which requires sufficient records to demonstrate that the conditions of the exemption have been met. The Department does not have data on how many pension consultants, insurance companies, and investment company principal underwriters would continue to rely on PTE 84-24 as amended without also complying with the amended PTE 2020-02. In this analysis, the Department

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<sup>77</sup> This is estimated as:  $[(12,000 \text{ retrospective reviews} \times 5 \text{ minutes}) \div 60 \text{ minutes}] = 1,000 \text{ hours}$ . A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation:  $[(12,000 \text{ retrospective reviews} \times 5 \text{ minutes}) \div 60 \text{ minutes}] \times \$63.45 = \$63,450$ .

assumes that all of the pension consultants and investment company principal underwriters continuing to rely on the amended PTE 84-24 would also rely on the amended PTE 2020-02. Thus, to avoid double counting the compliance cost, this analysis does not include the cost associated with the proposed recordkeeping requirement for these entities.

For this analysis, the Department considers the cost for insurance companies and Independent Producers complying with the proposed recordkeeping requirements. The Department estimates that the additional time needed to maintain records for the financial institutions to be consistent with the exemption would take an Independent Producer 2 hours, resulting in an hour burden of 8,430 hours and an equivalent cost of \$1.3 million.<sup>78</sup>

<b>Table 16: Hour Burden and Equivalent Cost Associated with the Recordkeeping Requirement</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	8,430	\$1,340,036	8,430	\$1,340,036
<b>Total</b>	<b>8,430</b>	<b>\$1,340,036</b>	<b>8,430</b>	<b>\$1,340,036</b>

For the purposes of this analysis, the Department assumes that, on average, an Independent Producer would receive 10 requests per year and that preparing and sending each request would take a legal professional, on average, 30 minutes. Based on these assumptions, the Department estimates that the proposed amendments would result in an annual hour burden of 20,000 hours with an equivalent cost of approximately \$3.2 million.<sup>79</sup> The Department requests comment on how often financial institutions would receive requests for records and how long the preparation of such records would take.

<sup>78</sup> This is estimated as: (4,000 Independent Producers + 215 insurance companies) x 2 hours = 8,430 hours. A labor rate of \$158.94 is used for an Independent Producer and a rate of \$159.34 for an insurance company legal professional. The labor rate is applied in the following calculation: [(4,000 Independent Producers x 2 hours x \$158.94) + (215 insurance companies x 2 hours x \$159.34)] = \$1,340,036.

<sup>79</sup> The burden is estimated as: {(4,000 Independent Producers x 10 requests) x 30 minutes} ÷ 60 minutes = 20,000 hours. A labor rate of \$158.94 is used for an Independent Producer. The labor rate is applied in the following calculation: {(4,000 Independent Producers x 10 requests) x 30 minutes} ÷ 60 minutes} x \$158.94 = \$3,178,800.

<b>Table 17: Hour Burden and Equivalent Cost Associated with the Recordkeeping Requirement</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Independent Producer	20,000	\$3,178,800	20,000	\$3,178,800
<b>Total</b>	<b>20,000</b>	<b>\$3,178,800</b>	<b>20,000</b>	<b>\$3,178,800</b>

#### **1.4. Overall Summary**

These paperwork burden estimates are summarized as follows:

*Type of Review:* Revision of an Existing Collection.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters.

*OMB Control Number:* 1210-0158.

*Affected Public:* Businesses or other for-profits; not for profit institutions.

*Estimated Number of Respondents:* 7,221.

*Estimated Number of Annual Responses:* 119,376.

*Frequency of Response:* Initially, Annually, When engaging in exempted transaction.

*Estimated Total Annual Burden Hours:* 123,726 hours.

*Estimated Total Annual Burden Cost:* \$8,457.

#### **Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA)<sup>80</sup> imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.<sup>81</sup> Under section 603 of the RFA, agencies must submit

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<sup>80</sup> 5 U.S.C. 601 *et seq.*

<sup>81</sup> 5 U.S.C. 601(2), 603(a); see also 5 U.S.C. 551.

an initial regulatory flexibility analysis (IRFA) of a proposal that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This proposed amended exemption, along with related amended exemptions and a proposed rule amendment published elsewhere in this issue of the *Federal Register*, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this proposed amendment on small entities is included in the IRFA for the entire project, which can be found in the related notice of proposed rulemaking found elsewhere in this edition of the *Federal Register*.

### **Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995<sup>82</sup> requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposed amended exemption does not include any Federal mandate that will result in such expenditures.

### **Federalism Statement**

Executive Order 13132 outlines fundamental principles of federalism. It also requires federal agencies to adhere to specific criteria in formulating and implementing policies that have “substantial direct effects” on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that

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<sup>82</sup> Pub. L. 104-4, 109 Stat. 48 (Jan. 4, 1995).



have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, ERISA section 514 provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department does not intend this exemption to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this proposed class exemption has federalism implications because it has no substantial direct effect on the States, on the relationship between the National government and the States, or on the distribution of power and responsibilities among the various levels of government.

### **General Information**

The attention of interested persons is directed to the following: (1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary, or other party in interest or disqualified person with respect to a Plan, from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge his or her duties respecting the Plan solely in the interests of the participants and beneficiaries of the Plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of Code section 401(a) that the Plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their beneficiaries; (2) Before the proposed exemption may be granted under ERISA section 408(a) and Code section

4975(c)(2), the Department must find that it is administratively feasible, in the interests of Plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of the Plan and IRA owners; (3) If granted, the proposed exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and (4) The proposed exemption, if granted, is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules.

Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

The Department is proposing the following amendment on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, Subpart B (76 FR 66637 (October 27, 2011)).<sup>83</sup>

## **Proposed Amendment to PTE 84-24**

### **Section I—Retroactive Application**

The restrictions of sections 406(a)(1)(A) through (D) and 406(b) of the Act and the taxes imposed by section 4975 of the Code do not apply to any of the transactions described in section III of this exemption in connection with purchases made before November 1, 1977, if the conditions set forth in section IV are met.

### **Section II—Prospective Application**

(a) Except for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder, the restrictions of section 406(a)(1)(A) through (D) and 406(b) of the Act and the taxes imposed by section 4975 of the Code do not apply to any of the transactions described in

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<sup>83</sup> Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

section III(a)-(f) of this exemption in connection with purchases made after October 31, 1977, if the conditions set forth in sections IV, V and IX are met.

(b) Effective on the date that is 60 days after the publication of a final amendment in the *Federal Register*, the restrictions of ERISA sections 406(a)(1)(D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder will not apply if the fiduciaries are Independent Producers, the transactions meet the requirements described in Section III(g), the conditions set forth in Sections VI, VII and IX are satisfied, and the Independent Producer and Insurer are not ineligible under Section VIII.

### **Section III—Transactions**

(a) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a Mutual Fund Commission or an Insurance Sales Commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract.

(b) The receipt of a Mutual Fund Commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company.

(c) The effecting by an insurance agent or broker, pension consultant or investment company Principal Underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company.

(d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company.

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-approved Plan.

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when such investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-approved plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2).

(g) The receipt, directly or indirectly, by an Independent Producer of an Insurance Sales Commission as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), regarding the purchase of a non-security annuity contract or other insurance product not regulated by the Securities and Exchange Commission (SEC) of an Insurer that is not an Affiliate, including as part of a rollover from a Plan to an IRA as defined in Code section 4975(e)(1)(B) or (C).

#### **Section IV—Conditions With Respect to Transactions Described in Section III(a)-(f)**

The following conditions apply solely to a transaction described in Section III(a)-(f):

(a) The transaction is effected by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter in the ordinary course of its business as such a person.

(b) The transaction is on terms at least as favorable to the plan as an arm's-length transaction with an unrelated party would be.

(c) The combined total of all fees, commissions and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter:

(1) For the provision of services to the plan; and

(2) In connection with the purchase of insurance or annuity contracts or securities issued by an investment company is not in excess of “reasonable compensation” within the contemplation of section 408(b)(2) and 408(c)(2) of the Act and sections 4975(d)(2) and 4975(d)(10) of the Code. If such total is in excess of “reasonable compensation,” the “amount involved” for purposes of the civil penalties of section 502(i) of the Act and the excise taxes imposed by section 4975(a) and (b) of the Code is the amount of compensation in excess of “reasonable compensation.”

### **Section V—Conditions for Transactions Described in Section III (a) Through (d)**

The following conditions apply solely to a transaction described in subsections (a), (b), (c) or (d) of section III:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter is not

(1) a trustee of the plan (other than a Nondiscretionary Trustee who does not render investment advice with respect to any assets of the plan),

(2) a plan administrator (within the meaning of section 3(16)(A) of the Act and section 414(g) of the Code),

(3) a fiduciary who is authorized to manage, acquire, or dispose of the plan’s assets on a discretionary basis, or

(4) for transactions described in sections III (a) through (d) entered into after December 31, 1978, an employer any of whose employees are covered by the plan.

Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter that is affiliated with a trustee or an investment manager (within the meaning of section VI(b)) with respect to a plan may engage in a transaction described in section III(a) through (d) of this exemption on behalf

of the plan if such trustee or investment manager has no discretionary authority or control over the plan assets involved in the transaction other than as a Nondiscretionary Trustee.

(b)(1) With respect to a transaction involving the purchase with plan assets of an insurance or annuity contract or the receipt of an Insurance Sales Commission thereon, the insurance agent or broker or pension consultant provides to an independent fiduciary or IRA owner with respect to the plan prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the agent, broker, or consultant is an affiliate of the insurance company whose contract is being recommended, or if the ability of such agent, broker or consultant to recommend insurance or annuity contracts is limited by any agreement with such insurance company, the nature of such affiliation, limitation, or relationship;

(B) The Insurance Sales Commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the recommended contract; and

(C) For purchases made after June 30, 1979, a description of any charges, fees, discounts, penalties or adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination or sale of such contract.

(2) Following the receipt of the information required to be disclosed in subsection (b)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner acknowledges in writing receipt of such information and approves the transaction on behalf of the plan. Such fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or broker, pension consultant or insurance company involved in the transaction. Such fiduciary may not receive, directly or

indirectly (e.g., through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(c)(1) With respect to a transaction involving the purchase with plan assets of securities issued by an investment company or the receipt of a Mutual Fund Commission thereon by an investment company Principal Underwriter, the investment company Principal Underwriter provides to an Independent fiduciary or IRA owner with respect to the plan, prior to the execution of the transaction, the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the person recommending securities issued by an investment company is the Principal Underwriter of the investment company whose securities are being recommended, the nature of such relationship and of any limitation it places upon the Principal Underwriter's ability to recommend investment company securities;

(B) The Mutual Fund Commission, expressed as a percentage of the dollar amount of the plan's gross payment and of the amount actually invested, that will be received by the Principal Underwriter in connection with the purchase of the recommended securities issued by the investment company; and

(C) For purchases made after December 31, 1978, a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination or sale of such securities.

(2) Following the receipt of the information required to be disclosed in subsection (c)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner approves the transaction on behalf of the plan. Unless facts or circumstances would indicate the contrary, such approval may be presumed if the fiduciary or IRA

owner permits the transaction to proceed after receipt of the written disclosure. Such fiduciary may be an employer of employees covered by the plan, but may not be a Principal Underwriter involved in the transaction. Such fiduciary may not receive, directly or indirectly (e.g., through an affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(d) With respect to additional purchases of insurance or annuity contracts or securities issued by an investment company, the written disclosure required under subsections (b) and (c) of this section V need not be repeated, unless—

(1) More than three years have passed since such disclosure was made with respect to the same kind of contract or security, or

(2) The contract or security being recommended for purchase or the commission with respect thereto is materially different from that for which the approval described in subsections (b) and (c) of this section was obtained.

#### **Section VI--Conditions for Transactions Described in Section III(g)**

The following conditions apply solely to a transaction described in subsection (g) of section III:

(a) The Independent Producer is authorized to sell annuities from two or more unrelated Insurers.

(b) The Independent Producer and the Insurer satisfy the applicable conditions in Sections VII and IX and are not ineligible under Section VIII. The Insurer will not necessarily become a fiduciary under ERISA or the Code merely by complying with the exemption's conditions.

#### **(c) Exclusions.**

The relief in Section III(g) is not available if:

(1) The Plan is covered by Title I of ERISA and the Independent Producer,



Insurer, or any Affiliate is:

(A) the employer of employees covered by the Plan, or

(B) the Plan's named fiduciary or administrator; provided however that a named fiduciary or administrator or their Affiliate may rely on the exemption if it is selected to provide investment advice by a fiduciary who:

(i) is not the Insurer, Independent Producer, or an Affiliate;

(ii) does not have a relationship to or an interest in the Insurer, Independent Producer, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by the exemption;

(iii) does not receive and is not projected to receive within the current federal income tax year, compensation or other consideration for their own account from the Insurer, Independent Producer, or an Affiliate in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year; or

(iv) is not the IRA owner or beneficiary; or

(2) The Independent Producer transaction involves the Independent Producer and Insurer acting in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B).

## **Section VII--Investment Advice Arrangement**

Section VII(a) requires Independent Producers to comply with Impartial Conduct Standards, including a Best Interest standard, when providing fiduciary investment advice to Retirement Investors. Section VII(b) requires Independent Producers to provide to Retirement Investors a written acknowledgement that the Independent Producer is a fiduciary under Title I of ERISA and/or the Code, a written statement of the Best Interest standard of care, a written description of the services they will provide and the products they are licensed and authorized to sell, and a written statement of their material Conflicts of Interest and the amount of the Insurance Commission that will be paid to them in

connection with the purchase of the recommended annuity by a Retirement Investor. In addition, before the sale of a recommended annuity, Independent Producers must consider and document their conclusions as to whether the recommended annuity is in the Best Interest of the Retirement Investor. Independent Producers recommending a rollover must also provide additional disclosure as set forth in subsection (b), below. Section VII(c) requires Insurers to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Section VII(d) requires the Insurer to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the Impartial Conduct Standards and the terms of this exemption. Section VII(e) allows Independent Producers to correct certain violations of the exemption conditions and maintain relief under the exemption. In complying with this Section VII, the Independent Producer may reasonably rely on factual representations from the Insurer, and Insurers may rely on factual representations from the Independent Producer, as long as they do not have knowledge that such factual representations are incomplete or inaccurate.

**(a) Impartial Conduct Standards**

(1) The Independent Producer's investment advice is, at the time it is provided, in the Retirement Investor's Best Interest. As defined in Section X(b), advice is in the Retirement Investor's Best Interest if it (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and (B) does not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the Retirement Investor's interests, or subordinate the Retirement

Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party. For example, in choosing between annuity products offered by Insurers, whose products the Independent Producer is authorized to sell, it is not permissible for the Independent Producer to recommend a product that is worse for the Retirement Investor, but better or more profitable for the Independent Producer or the Insurer; (2) The Independent Producer receives no compensation in connection with the transaction other than the Insurance Sales Commission, and the Insurance Sales Commission does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and

(3) The Independent Producer's statements to the Retirement Investor about the recommended transaction and other relevant matters are not, at the time the statements are made, materially misleading. For purposes of this subsection, the term "materially misleading" includes omitting information that is needed to make the statement not misleading in light of the circumstances under which it was made.

**(b) Disclosure**

Prior to engaging in a transaction described in Section III(g), the Independent Producer provides the disclosures set forth in paragraphs (1)-(5) to the Retirement Investor:

(1) A written acknowledgment that the Independent Producer is a fiduciary under Title I and the Code, as applicable, with respect to any investment recommendation provided by the Independent Producer to the Retirement Investor;

(2) A written statement of the Best Interest standard of care owed by the Independent Producer to the Retirement Investor;

(3) A written description of the services to be provided and the Independent Producer's material Conflicts of Interest that is accurate and not misleading in any material respects. The description will include the products the Independent Producer is

licensed and authorized to sell. The description must inform the Retirement Investor in writing of any limits on the range of insurance products recommended. The Independent Producer must identify the specific Insurers and specific insurance products available for recommendation.

(4) A written statement of the amount of the Insurance Commission that will be paid to the Independent Producer in connection with the purchase by a Retirement Investor of the recommended annuity. The statement must disclose the amount of expected Insurance Sales Commission, expressed both in dollars and as a percentage of gross annual premium payments, if applicable, for the first year and for each of the succeeding years.

(5) A written statement that the Retirement Investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, nature with in sufficient detail to permit the Retirement Investor to make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest, and describe how the Retirement Investor can get the information, free of charge.

(6) Before the sale of a recommended annuity, the Independent Producer considers and documents its conclusions as to whether the recommended annuity is in the Best Interest of the Retirement Investor and provides that documentation to both the Retirement Investor and to the Insurer;

(7) *Rollover disclosure.* Before engaging in a rollover or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Independent Producer must consider and document its conclusions as to whether a rollover is in the Retirement Investor's Best Interest and provide that documentation to both the Retirement Investor and to Insurer. Relevant

factors to consider must include to the extent applicable, but in any event are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan, if applicable;

(B) the comparative fees and expenses;

(C) whether an employer or other party pays for some or all administrative expenses; and

(D) the different levels of fiduciary protection, services, and investments available.

(6) Independent Producers and Insurers may rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know (or have a reason to know) that such information is incomplete or inaccurate.

(8) The Independent Producer is not required to disclose information pursuant to this Section VII(b) if such disclosure is otherwise prohibited by law.

**(c) Policies and Procedures**

(1) The Insurer establishes, maintains, and enforces written policies and procedures for the review of each recommendation before an annuity is issued to a Retirement Investor pursuant to an Independent Producer's recommendation that are prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The Insurer's prudent review of the Independent Producer's specific recommendations must be made without regard to the Insurer's own interests. An Insurer is not required to supervise an Independent Producer's recommendations to Retirement Investors of products other than annuities offered by the Insurer.

(2) The Insurer's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the

Independent Producer to place its interests, or those of the Insurer, or any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. The Insurer's procedures identify and eliminate quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in the Retirement Investor's Best Interest, or that subordinate the interests of the Retirement Investor to the Independent Producer's own interests, or those of the Insurer, or to make recommendations based on the Independent Producer's considerations of factors or interests other than the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

(3) The Insurer's policies and procedures include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors, and for taking action to protect Retirement Investors from Independent Producers who have failed or are likely to fail to adhere to the Impartial Conduct Standards, or who lack the necessary education, training, or skill. A prudent process includes careful review of customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The Insurer must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards, and must review that determination at least annually as part of the retrospective review set forth in subsection (d) below.

(4) Insurers must provide their complete policies and procedures to the Department within 10 business days of request.

**(d) Retrospective Review**

(1) The Insurer conducts a retrospective review, at least annually, that is

reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of the exemption, including the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption, including the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any. The retrospective review must also include a review of Independent Producers' rollover recommendations and the required rollover disclosure. As part of this review, the Insurer must prudently determine whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer updates the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with Section VII(c).

(2) The Insurer annually provides a written report to a Senior Executive Officer which details the review.

(3) The Insurer provides to the Independent Producer the methodology and results of the retrospective review;

(4) A Senior Executive Officer of the Insurer certifies, annually, that:

(A) The officer has reviewed the report of the retrospective review report;

(B) The Insurer has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transaction discovered by the Insurer in connection with investment advice covered under Code section 4975(e)(3)(B), advised the Independent Producer of the violation and any resulting excise taxes owed under Code section 4975, and notified the Department of Labor of the violation via email to PTE\_84-24@dol.gov.

(C) The Insurer has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after

consideration of the findings in the retrospective review report; and

(D) The Insurer has in place a prudent process to modify such policies and procedures as set forth in Section II(d)(1).

(5) The review, report, and certification are completed no later than six months following the end of the period covered by the review.

(6) The Insurer retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 10 business days of request, to the extent permitted by law.

**(e) Self-Correction**

A non-exempt prohibited transaction will not occur due to a violation of the exemption's conditions with respect to a transaction, provided:

(1) Either the Independent Producer has refunded any charge to the Retirement Investor or the Insurer has rescinded a mis-sold annuity, canceling the contract and waiving the surrender charges;

(2) The Independent Producer notifies the Department of Labor of the violation and the refund or rescission via email to [PTE\\_84-24@dol.gov](mailto:PTE_84-24@dol.gov) within 30 days of correction;

(3) The correction occurs no later than 90 days after the Independent Producer learned of the violation or reasonably should have learned of the violation; and

(4) The Independent Producer notifies the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under Section VII(d)(2).



## **Section VIII—Eligibility**

### **(a) Independent Producer**

Subject to the timing and scope provisions set forth in subsection (3), and the opportunity to be heard as set forth in subsection (c), an Independent Producer will be ineligible to rely on the relief for transactions described in Section III(g), if within 10 years preceding the transaction, the Independent Producer is described in (1) or (2):

(1) The Independent Producer has been convicted either:

(A) by a U.S. federal or state court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A).

For purposes of this section (a)(1), a person shall be deemed to have been convicted of a crime as of the "conviction date," which is the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. federal or state trial court), regardless of whether that judgment remains under appeal.

(2) The Independent Producer has received a written ineligibility notice issued by the Department for:

(A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally violating, or knowingly participating in violations of, the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or

(D) providing materially misleading information to the Department in connection with the conditions of the exemption.

(3) Ineligibility shall begin six months after:

(A) the conviction date defined in Section (a)(1);

(B) the date of the Department's written determination under Section (c)(1)(C) on a petition regarding a foreign conviction; or

(C) the date of the written ineligibility notice described in subsection (a)(2).

(4) An Independent Producer shall become eligible to rely on this exemption again only upon the earliest of the following:

(A) the date of a subsequent judgment reversing such person's conviction;

(B) 10 years after the person became ineligible under Section VIII(a)(3) or 10 years after the person was released from imprisonment as a result of a crime described in (a)(1) if later; or

(C) the date, if any, the Department grants an individual exemption which may impose additional conditions) to the person permitting its continued reliance on this exemption, notwithstanding the conviction.

**(b) Insurers**

Subject to the timing and scope provisions set forth in subsection (3), and the opportunity to be heard as set forth in subsection (c), an entity will be ineligible to serve as an Insurer if, within the 10 years preceding the transaction:

(1) The Insurer or the Affiliate has been convicted:

(A) by a U.S. federal or state court of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A).

For purposes of this Section (b)(1), a person shall be deemed to have been convicted of a crime as of the "conviction date," which is the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. federal or state trial court), regardless of whether that judgment remains under appeal.

(2) The Insurer or an Affiliate has received a written ineligibility notice issued by the Department for:

(A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally violating, or knowingly participating in violation of, the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or

(C) providing materially misleading information to the Department in connection with the conditions of the exemption.

(3) Ineligibility shall begin six months after:

(A) the conviction date as defined in Section (b)(1);

(B) the Department's written determination under Section (c)(1)(C) for a petition regarding a foreign conviction; or

(C) the date of the written ineligibility notice described in subsection (b)(2) above.

(4) An entity shall become eligible to act as an Insurer under this exemption again only upon the earliest of the following:

(A) the date of a subsequent judgment reversing such person's conviction;

(B) 10 years after the person became ineligible under Section VIII(b)(3) or 10 years after the person was released from imprisonment as a result of a crime described in (b)(1), if later; or

(C) the date, if any, the Department grants an individual exemption (which may impose additional conditions) to the person permitting its continued reliance on this exemption, notwithstanding the conviction.

**(c) Opportunity to be heard**

(1) Foreign Convictions.

(A) An Insurer, its Affiliate, or an Independent Producer that has been convicted by a foreign court of competent jurisdiction as provided in subsection (a)(1)(B) or (b)(1)(B), as applicable, may submit a petition to the Department that informs the Department of the conviction and seeks the Department's determination that continued

reliance on the exemption would not be contrary to the purposes of the exemption.

Petitions must be submitted to the Department within 10 business days after the conviction date by email at [IIAWR@dol.gov](mailto:IIAWR@dol.gov).

(B) Following receipt of the petition, the Department will provide the Insurer or Independent Producer with the opportunity to be heard, in person (including by phone or videoconference), in writing, or a combination thereof. The opportunity to be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences.

(C) Following the hearing, the Department will issue a written determination to the Insurer or Independent Producer, as applicable, articulating the basis for its determination whether or not to allow the Insurer or Independent Producer to continue relying on PTE 84-24.

(2) Written Ineligibility Notice. Prior to issuing a written ineligibility notice, the Department will issue a written warning to the Independent Producer or Insurer, as applicable, identifying specific conduct implicating subsection (a)(2) or (b)(2), as applicable, and providing a six-month opportunity to cure. At the end of the six-month period, if the Department determines that the Independent Producer or Insurer has not taken appropriate action to prevent recurrence of the disqualifying conduct, it will provide the Independent Producer or Insurer with the opportunity to be heard, in person (including by phone or videoconference), or in writing, or a combination thereof, before the Department issues the written ineligibility notice. The opportunity to be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences. The written ineligibility notice will state the basis for the determination that the Independent Producer or Insurer engaged in conduct described in subsection (a)(2) or (b)(2), as applicable, and has not taken appropriate action to prevent recurrence of the disqualifying conduct.

(3) Department's Considerations. For hearings under (c)(1) and (c)(2), the Department will consider: the gravity of the offense; the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy; recency of the conduct at issue; any remedial measures taken; and other factors the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption.

**(d) Alternative exemptions**

An Insurer or Independent Producer that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or seek an individual prohibited transaction exemption from the Department. To the extent an applicant seeks retroactive relief in connection with an exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of retroactive relief.

**Section IX—Recordkeeping**

(a) The insurance agent or broker (or the insurance company whose contract is being described if designated by the agent or broker), pension consultant or investment company Principal Underwriter, Independent Producer or Insurer must maintain the records necessary to enable the persons described in subsection (a)(2) below to determine whether the conditions of this exemption have been met with respect to a transaction for a period of six years from the date of the transaction in a manner that is reasonably accessible for examination. No prohibited transaction will be considered to have occurred solely on the basis of the unavailability of such records if they are lost or destroyed due to circumstances beyond the control of the responsible party before the end of the six-year period.

(1) No party, other than the party responsible for complying with this section IX,

will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the excise tax imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or available for examination as required by this section IX.

(2) Except as provided in subsection (3), and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records are reasonably available at their customary location during normal business hours for examination by:

(A) Any authorized employee of the Department or the Internal Revenue Service or another state or federal regulator;

(B) Any fiduciary of a Plan that engaged in a transaction pursuant to this exemption;

(C) Any contributing employer and any employee organization whose members are covered by a Plan that engaged in a transaction pursuant to this exemption; or

(D) Any participant or beneficiary of a Plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

(3) None of the persons described in subsection (2)(B)-(D) above are authorized to examine records regarding a transaction involving another Retirement Investor, privileged trade secrets or privileged commercial or financial information of the Insurer, or information identifying other individuals.

(4) If a party refuses to disclose information to a person described in subsection (2)(B)-(D) above on the basis that the information is exempt from disclosure, the party must provide a written notice advising the requestor of the reasons for its refusal and that the Department may request that such information be produced to the Department by the end of the thirtieth (30th) day following the request.

(b) A party's failure to maintain the records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been

maintained. Such failure does not affect the relief for other transactions if the responsible party maintains required records for such transactions in compliance with this section IV.

## **Section X—Definitions**

For purposes of this exemption, the terms “insurance agent or broker,” “pension consultant,” “insurance company,” “investment company,” and “Principal Underwriter” mean such persons and any Affiliates thereof. In addition, for purposes of this exemption:

(a) “**Affiliate**” of a person means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person (For this purpose, “control” would mean the power to exercise a controlling influence over the management or policies of a person other than an individual);

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the person; and

(3) Any corporation or partnership of which the person is an officer, director, or partner.

(b) Advice is in a Retirement Investor’s “**Best Interest**” if such advice (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and (B) does not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor’s interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party.

(c) A “**Conflict of Interest**” is an interest that might incline an Independent Producer—consciously or unconsciously—to make a recommendation that is not in the



Best Interest of the Retirement Investor.

(d) “**Independent Producer**” means a person or entity that is licensed under the laws of a state to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies but is not an employee of an insurance company (including a statutory employee under Code section 3121).

(e) “**Individual Retirement Account**” or “**IRA**” means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

(f) “**Insurer**” means an insurance company qualified to do business under the laws of a state, that: (A) has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state’s insurance commissioner within the preceding five years, (C) is domiciled in a state whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority; (D) is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization), that retains the Independent Producer as an independent contractor, agent or registered representative.

(g) “**Insurance Sales Commission**” means a sales commission paid by the Insurance Company or an Affiliate to the Independent Producer for the service of recommending and/or effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailing fees, but excluding revenue sharing payments, administrative fees or marketing payments, payments from parties other than the Insurance Company or its Affiliates, or any other similar fees.

(h) The term “**Mutual Fund Commission**” means a commission or sales load paid by either the Plan or the investment company for the service of effecting or executing the purchase of investment company securities, but does not include a 12b–1 fee, revenue sharing payment, administrative fee, or marketing fee.

(i) The term “**Nondiscretionary Trust Services**” means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1).

(j) The term “**Nondiscretionary Trustee**” of a plan means a trustee whose powers and duties with respect to the plan are limited to the provision of Nondiscretionary Trust Services. For purposes of this exemption, a person who is otherwise a Nondiscretionary Trustee will not fail to be a Nondiscretionary Trustee solely by reason of his having been delegated, by the sponsor of a Pre-approved Plan, the power to amend such plan.

(k) “**Plan**” means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(l) The term “**Pre-approved Plan**” means a plan which is approved by the Internal Revenue Service pursuant to the procedure described in Rev. Proc. 2017-44, 2017-29 I.R.B. 92, or its successors.

(m) A “**Principal Underwriter**” means a principal underwriter as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(29)).

(n) A “**Related Entity**” is any party that is not an Affiliate, but in which the Independent Producer has an interest that may affect the exercise of its best judgment as a fiduciary.

(o) “**Retirement Investor**” means:

(1) A participant or beneficiary of a Plan with authority to direct the investment of assets in their account or to take a distribution;

(2) The beneficial owner of an IRA acting on behalf of the IRA; or

(3) A fiduciary acting on behalf of a Plan or an IRA.

(p) A “**Senior Executive Officer**” is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Insurer.

Signed at Washington, DC, this 24th day of October, 2023.

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Lisa M. Gomez  
Assistant Secretary  
Employee Benefits Security Administration,  
U.S. Department of Labor

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